Supreme Court, U.S.
FILED
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07-872

No. 07-

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.
Petitioner,

v.

UNITED TRANSPORTATION UNION ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has the Eleventh Circuit erred in its repeated holding – in square conflict with other circuits – that a plaintiff is forbidden from naming as a "John Doe" defendant a party whose identity is reasonably not known at the time the complaint is filed?

RULE 29.6 STATEMENT

CSX Corporation is the only publicly traded entity that owns 10% or more of petitioner's stock.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties identified in the caption, Rufus McIntyre and unidentified members of the United Transportation Union are respondents here and were appellees below.

Table Of Contents

Question Presented i
Rule 29.6 Statement ii
Parties to the Proceedings Below ii
Table Of Contents ii
Table Of Authorities iv
Statement Of The Case 1
Reasons For Granting The Writ 7
Conclusion 16

Appendix A (Opinion of U.S. Court of Appeals for the Eleventh Circuit) 1a
Appendix B (Order of the U.S. District Court for the Middle District of Florida) 4a
Appendix C (Denial of Rehearing) 15a

TABLE OF AUTHORITIES

Cases

Am. Airlines v. Allied Pilots, 228 F.3d 574 (5th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001) 13

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986. 6

Ass'n of Contracting Plumbers v. Local Union No. 2 United Assoc. of Journeymen, 841 F.2d 461 (2d Cir. 1988) 14

Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30 (1957) 2

Billingsley v. McWhorter Farms, LLC, 3:06-cv-795-WKW, 2007 U.S. Dist. LEXIS 30695 (M.D. Ala. Apr. 25, 2007) 10

Billman v. Ind. Dep't of Corrs., 56 F.3d 785 (7th Cir. 1995) 12

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 8

Bryant v. Wausau Underwriters Ins. Co., No. 2:06-cv-1002-MEF, 2007 U.S. Dist. LEXIS 29005 (M.D. Ala. Apr. 18, 2007) 10

Butts v. Tyco Healthcare Group LP, No. 1:06-CV-1377-RLV, 2007 U.S. Dist. LEXIS 37847 (N.D. Ga. May 24, 2007) 10

Chicago & North Western Ry. Co. v. United Transp. Union, 402 U.S. 570 (1971) 2

Clemons v. Wal-Mart Stores, Inc., No. 06-0755-WS-B, Inc., 2007 U.S. Dist. LEXIS 61860 (S.D. Ala. Aug. 20, 2007) 10

Consolidated Rail Corp. v. Ry. Labor Executives Ass'n, 491 U.S. 299 (1989) 2

Dean v. Barber, 951 F.2d 1210, 1215-16 (11th Cir. 1992) 11

Delta Airlines, Inc. v. Air Line Pilots Ass'n, 238 F.3d 1300 (11th Cir. 2001) 3, 13

Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142 (1969) 1, 2

Duncan v. Duckworth, 644 F.2d 653 (7th Cir. 1981) . 8

Elsinore Shores Assoc. v. Local 54, Hotel Employees and Rest. Employees Int'l Union, 820 F.2d 62 (3d Cir. 1987) 14

Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge No. 100, 690 F.2d 838 (11th Cir. 1982) 14

Fuller v. Home Depot Servs., LLC, No. 1:07-CV-1268-RLV, 2007 U.S. Dist. LEXIS 59770 (N.D. Ga. Aug. 14, 2007) 10

Gallagher v. Geneva County Comm'n, No. 1:07cv660-WHA, 2007 U.S. Dist. LEXIS 63925 (M.D. Ala. Aug. 29, 2007) 10

Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980) ... 9, 12

Gillilan v. Walton, No. 1:07-CV-27, 2007 U.S. Dist. LEXIS 8820 (M.D. Ga. Feb. 7, 2007) 11

Hall v. Infirmary Health Sys., No. 06-0791-WS-B, 2007 U.S. Dist. LEXIS 18104 (S.D. Ala. Mar. 8, 2007) 10

Holbert v. Ga. Dep't of Human Res., No. 4:07-CV-071-RLV, 2007 U.S. Dist. LEXIS 89415 (N.D. Ga. Dec. 4, 2007) 9

Int'l Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) 1

John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers, 913 F.2d 544 (8th Cir. 1990) 14

Johnson v. Mobile County Sheriff Dep't, No. 06-0821-WS-B, 2007 U.S. Dist. LEXIS 50034 (S.D. Ala. July 9, 2007) 10

Jordan v. City of Montgomery, No. 2:06-cv-534-MEF-CSC, 2007 U.S. Dist. LEXIS 74072 (M.D. Ala. Oct. 3, 2007) 9

Joseph Schlitz Brewing Co. Container Div. v. Gen. Drivers, Warehousemen & Helpers Local Union 745 F. Supp. 320 (E.D. Tex. 1979) 15

Louisville & Nashville R.R. Co. v. Bass, 328 F. Supp. 732 (W.D. Ky. 1971) 14

Louisville & Nashville R.R. Co. v. Brown, 252 F.2d 149 (5th Cir. 1958) 2

Maclin v. Paulson, 627 F.2d 83 (7th Cir. 1980) 11

Mahmud v. Oberman, 508 F. Supp. 2d 1294 (N.D. Ga. 2007) 10

New v. Sports & Recreation, Inc., 114 F.3d 1092 (11th Cir. 1997) 7

Owaki v. City of Miami, 491 F. Supp. 2d 1140 (S.D. Fla. 2007) 10

Palmer v. Bd. of Educ., 46 F.3d 682 (7th Cir. 1995) 12

Perry v. Fleetwood Enters., No. 2:06-cv-502-MEF, 2007 U.S. Dist. LEXIS 73355 (M.D. Ala. Sept. 28, 2007) 10

Pickard v. Moore, No. 3:07-CV-270-MHT, 2007 U.S. Dist. LEXIS 41872 (M.D. Ala. June 8, 2007) 10

Pierce v. Odyssey Healthcare, Inc., No. 06-0561-WS-B, 2007 U.S. Dist. LEXIS 15107 (S.D. Ala. Mar. 1, 2007) 11

Portis v. Wal-Mart Stores, Inc., No. 07-0557-WS-C, 2007 U.S. Dist. LEXIS 77939 (S.D. Ala. Oct. 19, 2007) 9

Rolle v. Brevard County, 6:06-cv-714-ORL-19JGG, 2007 U.S. Dist. LEXIS 6920 (M.D. Fla. Jan. 31, 2007) 11

Roper v. Grayson, 81 F.3d 124 (10th Cir. 1996) 8

Rudd v. Geneva County Comm'n, No. 1:06-cv-00233-WKW, 2007 U.S. Dist. LEXIS 66891 (M.D. Ala. Sept. 10, 2007) 10

Ry. Express Agency, Inc. v. Bhd. of Ry. Clerks, 437 F.2d 388 (5th Cir. 1971) 14

Samuels v. Joyner, No. 06-0564-WS-M, 2007 U.S. Dist. LEXIS 3487 (S.D. Ala. Jan. 12, 2007) 11

Saxon v. ACF Indus., 254 F.3d 959 (11th Cir. 2001) 11

Schiff v. Kennedy, 691 F.2d 196 (4th Cir. 1982) 8

Scurtu v. Int'l Student Exch., No. 07-0410-WS-B, 2007 U.S. Dist. LEXIS 78999 (S.D. Ala. Oct. 19, 2007) 9

Siebert v. Allen, No. 2:07-cv-295-MEF-WC, 2007 U.S. Dist. LEXIS 74074 (M.D. Ala. Oct. 3, 2007) 10

Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115 (1974) 4

Susan J. v. Riley, No. 2:00-cv-918-MEF, 2007 U.S. Dist. LEXIS 51232 (M.D. Ala. July 13, 2007) 10

Texas & New Orleans R. Co. v. Ry. & Steamship Clerks, 281 U.S. 548 (1930) 1

U.S. v. Prof'l Air Traffic Controllers Org., 653 F.2d 1134 (7th Cir. 1981) 15

United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers, 243 F.3d 349 (7th Cir. 2001) .. 3

Wessinger v. Bd. of Regents, 1:06-cv-2626-WSD, 2007 U.S. Dist. LEXIS 34936 (N.D. Ga. May 14, 2007) 10

Wiggins v. Risk Enter. Mgmt. Ltd., 14 F. Supp. 2d 1279 (M.D. Ala. 1998) 7

Williams v. Allen, No. 2:07-cv-307-MEF-SRW, 2007 U.S. Dist. LEXIS 55594 (M.D. Ala. July 30, 2007) 10

Williams v. Martin, No. 1:06-cv-2161-WSD, 2007 U.S. Dist. LEXIS 802482 (N.D. Ga. Oct. 29, 2007) 9

Statutes

28 U.S.C. § 1441(a) 12

45 U.S.C. § 151a 1

Other Authorities

13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.3 (1984) 4

5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1321 8

5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3642 12

Fed. R. Civ. P. 10(a) 11

MOORE'S FEDERAL PRACTICE – CIVIL § 10.02 (3d ed. 2007) 8

STATEMENT OF THE CASE

Petitioner CSX Transportation, Inc. (CSXT) filed this lawsuit seeking declaratory and injunctive relief against an illegal work stoppage. Respondents are the defendants: a union, one if its general chairmen, and unnamed individual union members. CSXT did not identify the individual union members by name because it could not know at the time it filed the complaint which union members were participating in the unlawful work stoppage and which were instead absent from work for legitimate reasons. The court of appeals nonetheless held that the individual union members must be dismissed from the case under its rule – which other circuits squarely reject – that a complaint may not include unnamed defendants.

1. Congress enacted the Railway Labor Act (RLA) (45 U.S.C. § 151a, First) to prevent "wasteful strikes and interruptions" that would interfere with the operations of the nation's vital railroads and airlines and thereby disrupt commerce. *Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 148 (1969) (hereinafter "*Shore Line*"). *See also, e.g., Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 689-90 (1963); *Texas & New Orleans R. Co. v. Ry. & Steamship Clerks*, 281 U.S. 548, 565 (1930). The RLA effectuates that purpose by severely restricting work stoppages and slowdowns in both industries.

The parties to a collective bargaining agreement covered by the RLA must maintain the status quo while they negotiate disagreements over the terms of the agreement – so-called "major disputes." During

this period, strikes and other work stoppages are unlawful. *See, e.g., Shore Line*, 396 U.S. at 149-53. Strikes are also prohibited outright over "minor disputes" – *i.e.*, those over the interpretation of existing collective bargaining agreements – which must be arbitrated. *Consolidated Rail Corp. v. Ry. Labor Executives Ass'n*, 491 U.S. 299, 302 (1989).

Carriers may bring a private suit – seeking, *inter alia*, injunctive relief – to enforce the RLA's prohibition on strikes. *Bhd. of R.R. Trainmen v. Chicago River & Ind. R.R.*, 353 U.S. 30 (1957); *see also Chicago & North Western Ry. Co. v. United Transp. Union*, 402 U.S. 570 (1971). Importantly, the RLA applies equally to all forbidden strikes, whether or not organized by the union's leadership: "wildcat strikes" undertaken directly by employees are equally prohibited. *See, e.g., Louisville & Nashville R.R. Co. v. Brown*, 252 F.2d 149 (5th Cir. 1958).

2. Petitioner CSXT is one of the nation's largest railroads. Petitioner and respondent United Transportation (UTU) have entered into collective bargaining agreements governing CSXT's relationship with its trainmen.

At certain intervals, petitioner must perform regular maintenance on its tracks, which requires petitioner to limit the use of affected track segments. During these track "curfews," petitioner does not call ordinary train crews – engineers and trainmen – to work. For particular curfews in the past, CSXT and the UTU reached agreements for CSXT to pay trainmen for time they did not work.

This case arises from a July 2005 curfew affecting track that runs through Erwin, Tennessee. This is a

vital rail line because it carries roughly fifty percent of all the coal that CSXT delivers to utilities in the Southeast. Declaration of Michael Sullivan ¶ 2 [Dkt. 19].[1]

Petitioner and the UTU did not reach an agreement to pay trainmen for the July 2005 curfew. The day after the conclusion of the curfew, many of UTU's trainmen failed to return to work. As a consequence, CSXT was able to operate only seventeen of thirty-six scheduled trains.

The extraordinary absence of the trainmen in the immediate wake of an unpaid period of time led CSXT to the obvious conclusion that it was the subject of a prohibited work stoppage. CSXT believed that the UTU's members were seeking to pressure it to agree to amend the parties' collective agreement to guarantee that it would pay trainmen during curfews. Such a work stoppage – whether or not authorized by the union's leadership – would violate the RLA's status quo requirement, entitling petitioner to an injunction against the participants. *See, e.g., United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers,* 243 F.3d 349, 362 (7th Cir. 2001); *Delta Airlines, Inc. v. Air Line Pilots Ass'n,* 238 F.3d 1300, 1309-10 (11th Cir. 2001).

CSXT immediately filed this lawsuit, seeking injunctive and declaratory relief against both the current work stoppage and other such conduct in the future. CSXT named as defendants the UTU and one of its local officials called a General Chairman. CSXT

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[1] Record citations are as they appear in the appellate briefing.

also separately included as defendants "UTU-represented CSXT employees Nos. 1 through 100 * * * who are engaging in a work stoppage against CSXT arising from the disputes addressed herein." Complaint ¶ 7 [RE 1]. CSXT further alleged that "trainmen based out of Erwin are taking much longer than usual to exercise seniority to bid back into the positions that CSXT re-established in the Erwin conductor pools." *Id.* ¶ 23.

CSXT designated the employees in this fashion, rather than naming them individually, because it could not know whether particular union members were absent from work because of the illegal stoppage. Certain trainmen could be absent, for example, because they were victims of union intimidation or pressure to participate in the work stoppage.

The district court initially granted petitioner a restraining order but subsequently denied a preliminary injunction. Pet. App. B at 6a. Petitioner continued to litigate the case because of the potential for the repetition of illegal work stoppages after future curfews.[2] CSXT submitted evidence that the failure

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[2] Although the particular work stoppage has since concluded, the case is not moot. Petitioner's complaint seeks an declaratory and injunctive relief against later unlawful activity, which is a realistic possibility given that CSXT has a track curfew that affects Erwin-based trainmen most years. Decl. of Don Noell [Dkt. 61-2]. Moreover, such an unlawful, short-term work stoppage is the prototypical "illustration of the private disputes that are preserved from mootness by the prospect of future repetition." 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533.3 (1984). *See, e.g., Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 126-27 (1974) ("[T]he great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender. . . . The judiciary

of such an extraordinary number of trainmen to report for work after the curfew could not be explained as anything other than a work stoppage prohibited by the RLA, particularly given that the engineers did show up for work without incident.[3] Petitioner also sought discovery regarding, *inter alia*, which trainmen had engaged in the work stoppage. CSXT filed a motion to compel respondents to produce certain telephone records and noticed local union officials and eleven individual UTU members who worked out of Erwin that their depositions would be taken. CSXT was prevented from taking this discovery, because respondents refused to provide phone records and filed a motion for a protective order blocking the taking of any depositions. *See* Dkt. 63-1 and Dkt. 71.

Without ruling on CSXT's effort to secure discovery, the district court granted respondents summary judgment and dismissed the case. The court found that CSXT failed to prove that the UTU and its general chairman were involved in any event. The court also found that CSXT failed to show that a work stoppage had occurred, suggesting that the absence of so many trainmen could also be explained by a hypo-

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must not close the door to the resolution of the important questions these concrete disputes present.").

[3] Between 115 and 131 trainmen normally work out of Erwin on a daily basis. Immediately after the curfew ended, more than half (66) failed to report for work. Only between five and nine trainmen per day are usually absent. *See* Complaint ¶ 22 & Exs. 4-6 [RE 1] and Decl. of Steven R. Friedman ¶ 11 [Dkt. 16-2]. In contrast, locomotive engineers returned to work in a normal manner, and CSXT did not fail to operate any trains because of a lack of engineers. Decl. of Gregory J. Allard ¶ 11 [Dkt. 42-2].

thetical "severe flu outbreak." Pet. App. B at 12a and n.5.

3. CSXT appealed. The Eleventh Circuit affirmed the district court's conclusion that the UTU and its officers were entitled to summary judgment because CSXT had failed to submit sufficient evidence to create a triable issue on the question whether those particular defendants participated in any work stoppage. Pet. App. A at 2a But the court of appeals did not accept the district court's broader conclusion that *all* the defendants were entitled to summary judgment on the ground that no work stoppage occurred. Rather, the Eleventh Circuit deemed that "a close question" (*id.*), which would of course preclude summary judgment (*see, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) ("If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.")).

If the Eleventh Circuit had stopped there, the case would have been remanded. CSXT would have proceeded with its RLA suit against the unnamed individual union members on the theory that they had engaged in a forbidden wildcat strike. Specifically, petitioner would have pursued its claim that there had been a work stoppage and its request for discovery regarding which union members had participated. Given the extraordinary number of trainmen who had failed to report for work at the conclusion of the curfew (*see supra* at 5 n.3), CSXT would have had a substantial prospect of prevailing.

The Eleventh Circuit held, however, that the case must be dismissed against even the unnamed individual defendants. Pet. App. A at 3a n.1. On that al-

ternative basis, it affirmed the judgment of dismissal. The court of appeals relied on that court's prior precedent holding that dismissal of claims against John and Jane Doe defendants is required because "the Federal Rules do not authorize suit against fictitious parties." *Id.* (citing *New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997); *Wiggins v. Risk Enter. Mgmt. Ltd.*, 14 F. Supp. 2d 1279, 1279 n.1 (M.D. Ala. 1998)).

The Eleventh Circuit subsequently denied CSXT's petition for rehearing or rehearing en banc (Pet. App. C), which explained that the court's ruling conflicts with an uninterrupted wall of appellate authority holding that a complaint may be filed against unnamed defendants whose identities were reasonably not known at the time it was filed.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted because the Eleventh Circuit's prohibition on the use of unnamed defendants conflicts with a uniform line of authority from other circuits. The decision below moreover significantly interferes with the proper functioning of the Railway Labor Act – particularly with respect to the operations of railroads and airlines in the southeastern United States – because it eliminates a vital tool for halting the unlawful work stoppages that Congress recognized present a direct threat to the nation's economy.

1. It is well settled in virtually every federal court outside the Eleventh Circuit that "[a] complaint * * * may name an unknown defendant by using a 'John Doe' appellation or other description if the plaintiff has been unable to ascertain the real identity of the

defendant." MOORE'S FEDERAL PRACTICE – CIVIL § 10.02 (3d ed. 2007) . "When a plaintiff is ignorant as to the true identity of a defendant at the time of filing the complaint, most federal courts typically will allow the use of a fictitious name in the caption so long as it appears that the plaintiff will be able to obtain that information through the discovery process; should that not prove to be true, the action will be dismissed." 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1321.

Although this Court has not squarely addressed this practice, the lower federal courts cite *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 390 n.2 (1971), as the classic example implicitly approving it. In *Bivens*, this Court permitted a suit to go forward with fictitiously named defendants until the plaintiff could properly identify and serve the proper individual defendants.

Federal appellate authority endorsing the practice has long been – with the conspicuous exception of the Eleventh Circuit – essentially uniform. *E.g.*, *Roper v. Grayson*, 81 F.3d 124, 126 (10th Cir. 1996) ("Courts have generally recognized the ability of a plaintiff to use unnamed defendants so long as the plaintiff provides an adequate description of some kind which is sufficient to identify the person involved so process can eventually be served."); *Schiff v. Kennedy*, 691 F.2d 196, 198 (4th Cir. 1982) ("we recognize the necessity for allowing John Doe suits in the federal courts"); *Duncan v. Duckworth*, 644 F.2d 653, 656 (7th Cir. 1981) ("In such cases the court has held that, instead of dismissing a complaint because it fails to identify certain unnamed defendants, the dis-

trict court should order their disclosure or permit the plaintiff to obtain their identity through discovery."); *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) ("where the identity of alleged defendants will not be known prior to the filing of a complaint," "the plaintiff should be given an opportunity through discovery to identify the unknown defendants").

As this case illustrates, the Eleventh Circuit, by contrast, deems the use of unnamed defendants to amount to the prohibited use of "fictitious parties." *See New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997) (approving dismissal of Doe defendants on ground that "fictitious party practice is not permitted in federal court"), *cited at* Pet. App. A at 3a n.1. The en banc court of appeals was given the opportunity to revisit or disavow that rule in this case, but declined.

Applying the Eleventh Circuit's rule, district courts in that circuit constantly dismiss claims against unnamed defendants. For more than twenty-five examples within the last year alone, see, *e.g.*, *Holbert v. Ga. Dep't of Human Res.*, No. 4:07-CV-071-RLV, 2007 U.S. Dist. LEXIS 89415, at *3 (N.D. Ga. Dec. 4, 2007); *Williams v. Martin*, No. 1:06-cv-2161-WSD, 2007 U.S. Dist. LEXIS 80248, at *16 n.2 (N.D. Ga. Oct. 29, 2007); *Portis v. Wal-Mart Stores, Inc.*, No. 07-0557-WS-C, 2007 U.S. Dist. LEXIS 77939, at *4 n.1 (S.D. Ala. Oct. 19, 2007); *Scurtu v. Int'l Student Exch.*, No. 07-0410-WS-B, 2007 U.S. Dist. LEXIS 78999, at *2 n.1 (S.D. Ala. Oct. 19, 2007); *Jordan v. City of Montgomery*, No. 2:06-cv-534-MEF-CSC, 2007 U.S. Dist. LEXIS 74072, at *2 n.1 (M.D. Ala. Oct. 3, 2007); *Siebert v. Allen*, No. 2:07-cv-295-MEF-WC, 2007 U.S. Dist. LEXIS 74074, at *7 n.7 (M.D.

Ala. Oct. 3, 2007); *Perry v. Fleetwood Enters.*, No. 2:06-cv-502-MEF, 2007 U.S. Dist. LEXIS 73355, at *2 n.1 (M.D. Ala. Sept. 28, 2007); *Rudd v. Geneva County Comm'n*, No. 1:06-cv-00233-WKW, 2007 U.S. Dist. LEXIS 66891, at *4 (M.D. Ala. Sept. 10, 2007); *Gallagher v. Geneva County Comm'n*, No. 1:07cv660-WHA, 2007 U.S. Dist. LEXIS 63925, at *6 (M.D. Ala. Aug. 29, 2007); *Clemons v. Wal-Mart Stores, Inc.*, No. 06-0755-WS-B, Inc., 2007 U.S. Dist. LEXIS 61860, at *4 n.3 (S.D. Ala. Aug. 20, 2007); *Fuller v. Home Depot Servs., LLC*, No. 1:07-CV-1268-RLV, 2007 U.S. Dist. LEXIS 59770, at *2 n.1 (N.D. Ga. Aug. 14, 2007); *Williams v. Allen*, No. 2:07-cv-307-MEF-SRW, 2007 U.S. Dist. LEXIS 55594, at *9-10 n.7 (M.D. Ala. July 30, 2007); *Susan J. v. Riley*, No. 2:00-cv-918-MEF, 2007 U.S. Dist. LEXIS 51232, at *5 (M.D. Ala. July 13, 2007); *Johnson v. Mobile County Sheriff Dep't*, No. 06-0821-WS-B, 2007 U.S. Dist. LEXIS 50034, at *19 (S.D. Ala. July 9, 2007); *Owaki v. City of Miami*, 491 F. Supp. 2d 1140, 1156 (S.D. Fla. 2007); *Mahmud v. Oberman*, 508 F. Supp. 2d 1294, 1297 n.1 (N.D. Ga. 2007); *Pickard v. Moore*, No. 3:07-CV-270-MHT, 2007 U.S. Dist. LEXIS 41872, at *1 (M.D. Ala. June 8, 2007); *Butts v. Tyco Healthcare Group LP*, No. 1:06-CV-1377-RLV, 2007 U.S. Dist. LEXIS 37847, at *9-*10 (N.D. Ga. May 24, 2007); *Wessinger v. Bd. of Regents*, 1:06-cv-2626-WSD, 2007 U.S. Dist. LEXIS 34936, at *3-*4 (N.D. Ga. May 14, 2007); *Billingsley v. McWhorter Farms*, LLC, 3:06-cv-795-WKW, 2007 U.S. Dist. LEXIS 30695 (M.D. Ala. Apr. 25, 2007); *Bryant v. Wausau Underwriters Ins. Co.*, No. 2:06-cv-1002-MEF, 2007 U.S. Dist. LEXIS 29005, at *2 n.1 (M.D. Ala. Apr. 18, 2007); *Hall v. Infirmary Health Sys.*, No. 06-0791-WS-B, 2007 U.S. Dist. LEXIS 18104, at *2 n.1 (S.D. Ala. Mar. 8, 2007); *Pierce v.*

Odyssey Healthcare, Inc., No. 06-0561-WS-B, 2007 U.S. Dist. LEXIS 15107, at *2 n.1 (S.D. Ala. Mar. 1, 2007); *Gillilan v. Walton*, No. 1:07-CV-27, 2007 U.S. Dist. LEXIS 8820, at *3 n.1 (M.D. Ga. Feb. 7, 2007); *Rolle v. Brevard County*, 6:06-cv-714-ORL-19JGG, 2007 U.S. Dist. LEXIS 6920, at *47-*48 (M.D. Fla. Jan. 31, 2007); *Samuels v. Joyner*, No. 06-0564-WS-M, 2007 U.S. Dist. LEXIS 3487, at *13 n.4 (S.D. Ala. Jan. 12, 2007).[4]

2. Certiorari is furthermore warranted because the Eleventh Circuit's refusal to permit the use of unnamed defendants is erroneous. Federal Rule of Civil Procedure 10(a), which governs the form of pleadings in federal district courts, simply requires that the parties be specified and nowhere precludes plaintiffs from naming Doe defendants. *See* Fed. R. Civ. P. 10(a). In applying Rule 10(a), federal courts have appropriately sought guidance from similar state court pleading rules, which permit unnamed parties. *E.g.*, *Maclin v. Paulson*, 627 F.2d 83, 87 n.4 (7th Cir. 1980) (citing *Keno v. Doe*, 74 F.R.D. 587, 588-89 n.2 (D.N.J. 1977), *aff'd*, 578 F.2d 1374 (3d Cir. 1978)). For its part, Congress implicitly approved the use of fictitious names by preventing the citizenship of a John Doe defendant in a state suit from interfer-

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[4] The Eleventh Circuit only permits plaintiffs to include unnamed defendants in two limited contexts, both distinct. First, a *pro se* plaintiff may do so, if the defendant is identified with particularity. *See Dean v. Barber*, 951 F.2d 1210, 1215-16 (11th Cir. 1992) (permitting use of fictitious name because "pleadings of *pro se* complainants are treated with special care" and defendant in that case was identified as "Chief Deputy of the Jefferson County Jail"). Second, pursuant to FRCP 15(c)(1), the plaintiff in a diversity action may do so if permitted by the applicable state court rules. *Saxon v. ACF Indus.*, 254 F.3d 959 (11th Cir. 2001) (en banc).

ing with the suit's removal to federal court. *See* 28 U.S.C. § 1441(a) ("For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.").

The framers of the Rules of Civil Procedure moreover could not have imagined that the practice would be forbidden. The naming of Doe defendants is frequently essential to ensuring that a plaintiff can obtain relief, particularly when (as in this case) the plaintiff is injured by a collective body of individuals, some of whom are reasonably not known prior to discovery. *E.g.*, *Gillespie v. Civiletti*, 629 F.2d 637, 643 (9th Cir. 1980) (lower court abused discretion by failing to permit suit to proceed when unnamed defendants allegedly violated 42 U.S.C. §§ 1983, 1985). Without the use of fictitious defendants in such instances, "it may be impossible as a practical matter to obtain complete relief." *Palmer v. Bd. of Educ.*, 46 F.3d 682, 688 (7th Cir. 1995). The naming of John Doe defendants also affords a plaintiff who reasonably does not know the particular identity of a defendant prior to the running of a statute of limitations the opportunity to seek legal relief. *See* 5A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3642.

Indeed, this is a prototypical scenario in which the use of fictitious names is appropriate. As Judge Posner has explained, John and Jane Doe designations are proper in "any case in which, usually because the plaintiff has been injured as the consequence of the actions of an unknown member of a collective body, identification of the responsible party may be impossible without pretrial discovery." *Billman v. Ind. Dep't of Corrs.*, 56 F.3d 785, 789 (7th Cir. 1995). The plaintiff's "inability to identify his injurers is not by

itself a proper ground for the dismissal of his suit. Dismissal would gratuitously prevent him from using the tools of pretrial discovery to discover the defendants' identity." *Id.*

3. The Eleventh Circuit's application of its prohibition on Doe defendants in this case is particularly troubling because it threatens to substantially disrupt the proper functioning of the Railway Labor Act in the southeastern United States. The court's ruling seriously impedes the ability of railroads and airlines to secure effective relief to enforce the RLA's terms and to protect the public interest in avoiding interruptions to carrier operations from labor disputes.

Railroads and airlines regularly face work stoppages without notice. In such cases, they must act immediately – generally within hours – to seek emergency injunctive relief in order to permit their operations to continue. If the strike is not prevented or enjoined in its early moments, carrier operations will be seriously interrupted.

It is not enough that an injunction run against a union and its leaders. Union officials often attempt to disclaim responsibility for a slowdown. *See, e.g., Delta Airlines, Inc. v. Air Line Pilots Ass'n*, 238 F.3d 1300 (11th Cir. 2001); *Am. Airlines v. Allied Pilots*, 228 F.3d 574, 577 (5th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001). In other cases, the stoppage will be the result of a genuine wildcat strike directly by the employees. Whether or not authorized by their union, concerted action by employees in disregard of the RLA's mandatory dispute resolution procedures is illegal and must be enjoined. *See, e.g., Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge No. 100,*

690 F.2d 838, 841 (11th Cir. 1982) (sick-out initiated by employees); *Ry. Express Agency, Inc. v. Bhd. of Ry. Clerks*, 437 F.2d 388, 391 (5th Cir. 1971) (union lost control of local union members), *cert. denied*, 403 U.S. 919 (1971); *Louisville & Nashville R.R. Co. v. Bass*, 328 F. Supp. 732 (W.D. Ky. 1971) (wildcat strike over major dispute). More broadly, it can also take some time to restore normal operations even after union members have been ordered back to work. If the carrier cannot obtain prompt emergency injunctive relief directly against employees, the RLA's primary purpose is frustrated.

Railroads and airlines, however, often have no way of knowing in the early hours after a work stoppage begins which individual employees should be enjoined, especially if the union is denying involvement in the stoppage. A carrier often does not have time to first determine which particular union members are participating in a work stoppage, rather than absent for permissible reasons. Not surprisingly, in such cases, it is commonplace for plaintiffs (including the United States) to seek emergency injunctive relief against not only the union but also unidentified individual union members who are named as John and Jane Doe defendants. As in this case, the employer promptly seeks discovery to identify the individual participants in the work stoppage.[5]

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[5] *See, e.g., John Morrell & Co. v. Local Union 304A of the United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990); *Ass'n of Contracting Plumbers v. Local Union No. 2 United Ass'n. of Journeymen*, 841 F.2d 461 (2d Cir. 1988); *Elsinore Shores Assoc. v. Local 54, Hotel Employees and Res. Employees Int'l Union*, 820 F.2d 62 (3d Cir. 1987); *U.S. v. Prof'l Air Traffic*

Given the Eleventh Circuit's general rule against naming Doe defendants and its application of that rule in this case, in cases arising in the southeastern United States, unions can be counted on to move to dismiss requests for injunctive relief against union members who are included as unnamed defendants. In light of the circumstances in which such cases arise – with employers seeking injunctive relief to maintain their operations before they have the opportunity to identify individual participants in the strike – the rule applied by the Eleventh Circuit may prevent railroads and airlines from effectively seeking relief against union members that is essential to effectuate the RLA. This Court's intervention is accordingly warranted.

Controllers Org., 653 F.2d 1134 (7th Cir. 1981); *Joseph Schlitz Brewing Co. Container Div. v. Gen. Drivers, Warehousemen & Helpers Local Union 745*, 486 F. Supp. 320 (E.D. Tex. 1979).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Appendix A (Opinion of U.S. Court of Appeals for the Eleventh Circuit) 1a
Appendix B (Order of the U.S. District Court for the Middle District of Florida) 4a
Appendix C (Denial of Rehearing) 15a

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15637

D.C. Docket No. 05-00672 CV-J-25-TEM

CSX TRANSPORTATION, INC.,

Plaintiff-Appellant,

versus

UNITED TRANSPORTATION UNION,
RUFUS MCINTYRE, General Chairman,
United Transportation Union, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(June 7, 2007)

Before ANDERSON, MARCUS and COX, Circuit Judges.

PER CURIAM:

CSX Transportation, Inc. ("CSX") appeals following the district court's grant of summary judgment in favor of the Defendants United Transportation Union and Rufus McIntyre, the Union's General Chairman. CSX presents three arguments on this appeal: (1) the district court erred in granting summary judgment to the Defendants; (2) the district court erred in granting summary judgment while discovery motions were still pending; and (3) the district court erred in denying CSX's motion for leave to amend the complaint. After oral argument and careful consideration, we conclude that none of these arguments warrants reversal.

The district court's decision that no substantial evidence supports CSX's claim that a work stoppage or slowdown occurred presents a close question. That decision need not detain us, however, because we conclude that the district court properly determined that there was no genuine issue of material fact as to the Defendants' involvement in any work stoppage or slowdown and that no substantial evidence supported the claim that the Defendants were involved in any work stoppage or slowdown.

We reject CSX's argument that the district court abused its discretion in ruling on the summary judgment motion while discovery motions were pending because CSX explicitly asked the court to proceed to rule on the summary judgment motion.

And, we find no abuse of discretion in the denial of CSX's motion for leave to amend the complaint because the district court properly determined that the amendment would be futile given the lack of evidence that Defendants were involved in illegal job action.

AFFIRMED.[1]

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[1] The complaint names as defendants "John 1 & Jane Doe, UTU Represented CSXT Employees Nos. 1 through 100." This is no impediment to the closing of this case because the Federal Rules do not authorize suit against fictitious parties. *See New v. Sports and Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997); *Wiggins v. Risk Enter. Mgmt. Ltd.*, 14 F. Supp. 2d 1279, 1279 n.1 (M.D. Ala. 1998).

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CSX TRANSPORTATION, INC.,

Plaintiff,

vs.

UNITED TRANSPORTATION UNION, et al.

Defendants.

_____/

ORDER

This Case is before the Court upon Defendants' Motion for Summary Judgment (Dkt. 38) and Plaintiff's Motion for Reconsideration (Dkt. 59). Upon consideration of the evidence in this case, the Court finds as follows:

Background

Plaintiff CSX is a common carrier by railroad throughout the eastern United States. The workers relevant to this case are called trainmen and they are generally paid only when they work.

CSX asserts that Defendants engaged in a concerted, multiple day work stoppage or slowdown in the Erwin, Tennessee area in July of 2005. CSX con-

tends that the alleged stoppage or slowdown occurred because of an underlying dispute regarding its right to adjust certain labor pools and implement a temporary unpaid[1] shutdown, or curfew, on the relevant line.[2] Prior to the July 2005 shutdown at issue, how-

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[1] Evidently in the past, CSX paid the relevant employees when it temporarily shut the line down.

[2] In its initial pleadings and at the hearings in this case, CSX argued that the underlying dispute arose because the parties could not agree on whether the trainmen should be paid during the shut down. The Union took the position that Article 25 of the Collective Bargaining Agreement (Agreement) required CSX to either reduce the number of employees to zero during the shutdown – so the employees could seek work elsewhere – or keep the employee labor pool at 100%.

CSX took the position that a September 8. 2003 letter (Letter) allowed it to reduce the trainmen labor pool when the level of train traffic declined for reasons such as the July 2005 maintenance shut down. In essence, CSX took the position that the Letter modified Article 25.

CSX further contended that the Letter provided that both sides confer and reach an agreement on issues such as the July 2005 shutdown and if the parties fail to reach an agreement, CSX may make a temporary adjustment to the labor pool. If an adjustment occurs, the Union may then file a grievance under Rule 30 of the Agreement.

Regarding the failure of some of the trainmen to go back to work, the Union argued that the relevant employees were exercising an implied contractual right to take as long as 29 days off before "bidding" to another position – i.e. exercising their "displacement rights." According to the Union, during that 29 day period, the trainmen are under no obligation to be available for work.

Basically, the Union argued that there was no actual dispute under The Railway Labor Act (RLA): CSX simply failed to deal with its employees properly when it deviated from its past practice of paying them during shutdowns.

Also according to the Union, its representative initially asked that all positions be re-established on July 16,2005 but they

ever, the Union and CSX had reached an agreement regarding the labor pool adjustment.

CSX filed a Complaint and a Temporary Restraining Order (TRO) motion shortly after it reopened the line based on its position that many of the relevant workers were not returning to work quickly, thereby reducing its ability to operate ample trains. The Court granted the TRO motion after a hearing. While not making a definitive finding that Defendants were in fact engaging in a work stoppage or slowdown, the TRO prohibited any potential work stoppage or slowdown and directed the Union to put its employees on notice of same.

CSX then filed a Motion for Preliminary Injunction (Injunction Motion). The Injunction Motion sought to enjoin Defendants from engaging in a similar alleged work stoppage or slowdown in the future.

The Court denied the Injunction Motion after a hearing. In the Order denying the Injunction Motion, the Court found that CSX had not met all of the prerequisites for issuance of a preliminary injunction.

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were not; no jobs were available for the relevant employees on that day. Evidently on July 17, 2005, jobs were available but CSX did not contact the relevant employees regarding same; to find out about an opening, the employees would have to call CSX or check online. It appears that CSX did not contact the Union about the lack of trainmen until the next day, July 18, 2005, the same day it filed its Complaint and TRO motion.

At the hearings in this Case, the Union argued and provided evidence that it did attempt to get the trainmen back to work after CSX contacted it. By the time this Court held the preliminary injunction hearing the vast majority of the "displaced" trainmen had returned to work.

First, the Court found that Plaintiff had not proven that "unlawful acts have been committed:" CSX failed to prove any actual work stoppage had occurred. The Court found that CSX's statistical evidence of a work stoppage had been sufficiently rebutted by Defendants' proffered statistics. The Court also noted that Defendants argued, and CSX all but conceded, that there was no ongoing work stoppage or slowdown at the time the Court held the Injunction Motion hearing.

The Court further found that at that time of the Injunction Motion hearing, CSX simply could not demonstrate a threat of continuing irreparable harm. Evidently, at that time the underlying dispute regarding CSX's ability to adjust certain labor pools was being dealt with via the procedures outlined in the parties' collective bargaining agreement.

Defendants now seek summary judgment as to CSX's entire Complaint. Evidently, in response to Defendants' summary judgment motion, CSX filed not only an opposition but also a motion to amend its Complaint, seeking to add new claims. The Court denied the Motion to Amend and Plaintiff has filed a motion for the Court to reconsider this ruling.

As to the summary judgment motion, CSX's opposition complained that at the time Defendants filed their Motion, discovery had "not even commenced." The Court noted in its Order denying the Motion to Amend that in its opposition CSX represented that it had "learned additional details concerning its claims" since the original Complaint tiling. The Court presumed that at the very least some informal discovery had in fact commenced. Of course, the Court had held

evidentiary hearings in this case on July 20 and 28 of 2005.

In addition, the Court notes that CSX filed its response to the Summary Judgment Motion on October 24, 2005. CSX did not file a motion to extend its response time or ask the Court to defer ruling on the Summary Judgment Motion. Thus, the Summary Judgment Motion was clearly ripe when CSX tiled its Motion to Amend.

Regardless, out of an abundance of caution, the Court allowed CSX to supplement its response to the Summary Judgment Motion, including argument and any recently discovered evidence that supports the response. CSX did supplement its response and also filed a report generated by a statistician, Dr. Carrington, as well as the declaration of Mr. Noell, CSX's labor relations manager.

Motion for Reconsideration

A court will reconsider a ruling only when 1) there is an intervening change in controlling law, 2) new evidence becomes available, or 3) the court needs to correct clear error or manifest injustice. *Teresa* G. *Sussman v. Salem, Saxom* & *Nielsen,* 153 F.R.D. 689, 694 (M.D. Fla. 1994).

CSX argues that this Court should reconsider its Order denying its Motion to Amend because: (1) the Court must apply the same standard as a Motion to Dismiss, rather then Summary Judgment, when determining whether amendment would be futile; (2) the proposed Complaint raised new claims in that it

included a claim regarding a major dispute; (3) Count I of the Amended Complaint does not amount to a renumbering of Count II; (4) UTU never abandoned its position that its members should be paid during curfew; (5) the Court found that the proposed amendment to add Count III would be futile based on its preliminary finding that CSX had not proffered sufficient evidence to demonstrate a work stoppage; (5) [sic] the Court erred in finding "the meager and reluctant steps that the [union took to get the trainmen back to work] met the requirement of 'all practical steps' within the meaning of [the Statute];" and, (6) [sic] the Court's conclusion that a adding a monetary claim would be futile was "clear error."

As to the standard of review, at the time the Court denied the Motion to Amend, the Court had already held a Temporary Restraining Order and Preliminary Injunction hearing and was ready to rule on the fully briefed Summary Judgment motion. Given the procedural posture of the case, it was not inappropriate to comment on the evidence of record as it relates to summary judgment.

Also, as previously noted by the Court, the Motion to Amend appeared to amount to an additional response to the pending summary judgment motion. It is again worth mentioning that this case revolved around an alleged three day "job action" that occurred in July of 2005 and at the time of the Preliminary Injunction hearing, the alleged action was over. Denying the Motion to Amend at this stage was not

improper. *Addingtorm v. Famer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 667 (5th Cir. 1981).[3]

Defendants also note that the rest of the motion is a repetition of previously rejected arguments, which cannot serve as the a [sic] basis for a motion to reconsider. This Court agrees with the Defendants' argument and need not discuss each and every issue that Plaintiff complains about.

Because there has been no intervening change in controlling law, new evidence has not become available, and the Court does not need to correct clear error or manifest injustice, CSX's Motion for Reconsideration is denied.

Motion for Summary Judgment

Summary judgment is proper "if the pleadings, depositions. answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In reaching a summary judgment decision the court must view the facts in the light most favorable to the non-moving party. *United of Omaha Llfe Ins. Co. v. Sun Life Ins. Co. Of America,* 894 F.2d 1555, 1558 (11th Cir. 1990). However, in order to

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[3] In *Bonner v. City Prichard,* 661 F.2d 1206, 1209-11 (11th Cir. 198l) (en banc), the new Eleventh Circuit adopted as binding precedent all cases decided before October 1, 1981 by the former Fifth Circuit Court of Appeals.

avoid entry of summary judgment the non-moving party "may not rest upon the mere allegations or denials" of his pleadings: instead, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

As to the Complaint's claims, Defendants first argue that summary judgment is due to be granted because CSX cannot prove that a work stoppage was, and continues to be, committed. Defendants maintain that such a finding is foreclosed by this Court's prior findings in its Preliminary Injunction Order. CSX argues that any prior findings are not binding on the Court. Regardless, the Court notes that its Injunction Order docs not make a definitive finding whether a work stoppage or slowdown occurred during the relevant time period. A discussion of the parties' evidence is necessary.

Plaintiff's evidence that a work stoppage or slowdown occurred is primarily statistical. Plaintiff proffers the declaration of Gregory J. Allard who is the director of the Crew Management Center. Mr. Allard's declaration states that there were 63 trainmen displaced the last day of the curfew, July 17, 2005, and that there were 29 trainmen displaced on July 20, 2005. Mr. Allard contends that these numbers are "significantly greater than the number of employees normally in displaced status." (par. 12 of Allard's declaration).

As noted, Plaintiff's supplement to its original opposition includes a report generated by a statistician,

Dr. Carrington.[4] Plaintiff contends that the report demonstrates that the relevant trainmen were abnormally slow returning to work and that the likelihood that the trainmen would return to work as slow as they did *by chance* is essentially zero.

Even assuming that CSX's statistics on this issue are not in dispute, this evidence does not even come close to demonstrating there is a genuine issue of material fact as to whether an unlawful work stoppage occurred and whether any of the Defendants organized, encouraged, or even had advance knowledge of same.[5]

Specifically, proving that the trainmen were "abnormally slow" in returning to work does not amount to proof that an *illegal* job action occurred, especially considering the fact that the curfew did not end when originally planned and, evidently, the trainman were informed of the line's re-opening in the middle of the night and presumably only if they took the initiative to check; these circumstances could at least partially

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[4] The supplement also includes the declaration of Mr. Noell, CSX's labor relations manager, Mr. Noell's Declaration states that future curfews will occur that are similar to the 2005 curfew at issue.

[5] Indeed, if the Court accepted CSX's apparent argument that demonstrating a slow rate of return to work could not have occurred "by chance," is enough to demonstrate the requisite *illegal* slowdown occurred, a severe flu outbreak causing many employees to miss work (and not quickly return) would also tend to demonstrate the same proposition. Simply put, evidence that an unusually large amount of employees are not present at work does not mean that there is a nefarious motive explaining their absence.

explain the trainmen's slow return. Regardless, the Court need not speculate as to this point.

As to the Union, Defendants argue, and this Court agrees, that there is also no evidence to support the proposition that it had any role in any alleged work stoppage/slowdown. CSX cites *Delta* when discussing the Union's obligations regarding work slowdowns. *Delta Air Lines, Inc. v. Air Line Pilots, Ass'n, Intern.*, 238 F.3d 1300, 1309 (11th Cir. 2001) (*Delta).* However, *Delta* is distinguishable because in that case the Court found there an "ongoing campaign" involving the union and that the pilots involved in that case *had* engaged in a concerted effort to affect the outcome of contract negotiations. Here, CSX fails to provide *any* evidence of concerted activity. In the absence of such evidence, CSX cannot contend that there is a genuine issue of material fact sufficient to defeat summary judgment as to the Union. Further, an employer must proffer more than mere statistics to demonstrate union liability regarding an illegal job action. *United Air Lines, Inc. v. International Assn'n of Machinist and Aerospace Workers, AFL-CIO,* 243 F.3d 349, 366 (7th Cir. 2001) ("statistics alone will not provide clear proof of a union's involvement in a work action....").

Further, as to the individual employees, Plaintiff has provided no evidence that any individual employee coordinated or discouraged any trainman from seeking work during the relevant time period. Defendants note that while CSX had authority to investigate individual employee conduct and discipline the workers that were allegedly involved in a slowdown or stoppage: evidently, as of the date the Motion was

filed, it had not. Defendants have produced the declaration of the Union's Chairperson which states the time to initiate such action has expired. (McIntyre at par. 4).

In conclusion, this Court agrees with Defendants that CSX's evidence proves, if anything, that certain employees "marked up" for work at a slower pace than usual after an unpaid furlough. Even after being allowed the opportunity to supplement, CSX has not produced *any* evidence that any *illegal* job action occurred much less that any Defendant encouraged an illegal job action. Accordingly, it is **ORDERED**:

1. Plaintiff's Motion for Reconsideration (Dkt. 59) is **DENIED**.

2. Defendants' Motion for Summary Judgment (Dkt. 38) is **GRANTED**. The clerk is directed to enter judgment in favor of Defendants and against Plaintiff and close this case.

DONE AND ORDERED at Jacksonville, Florida this 25th day of September, 2006.

/s/ Judge Adams /s/
Henry Lee Adams, Jr.
United States District Judge

Copies to: Counsel of Record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15637

D.C. Docket No. 05-00672 CV-J-25-TEM

CSX TRANSPORTATION, INC.,

Plaintiff-Appellant,

versus

UNITED TRANSPORTATION UNION,
RUFUS MCINTYRE, General Chairman,
United Transportation Union, et al.,

Defendants-Appellees.

On appeal from the United States District Court
for the Middle District of Florida

(October 1, 2007)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before ANDERSON, MARCUS and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Judge Cox /s/

United States Circuit Judge

No. 07-872

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 1, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the court of appeals properly affirmed summary judgment in this case as to "John and Jane Doe" employees of petitioner, when petitioner neither named nor served individual employees/defendants during the fifteen months the case was pending in the district court; disavowed the need for discovery to respond to a summary judgment motion; and where any claims against heretofore unnamed defendants would be untimely under the Railway Labor Act.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Neither of the respondents has a parent corporation or has stock owned by a publicly held company.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
CONCLUSION	9

TABLE OF AUTHORITIES

FEDERAL CASES	Page
AFA v. Horizon Air Indus., Inc., 976 F.2d 541 (9th Cir. 1992)	7
Atlas Air, Inc. v. ALPA, 232 F.3d 218 (D.C. Cir. 2000)	7
Billman v. Indiana Dep't of Corrections, 56 F.3d 785 (7th Cir. 1995)	4, 5
BLE v. Atchison, Topeka & Santa Fe Ry. Co., 768 F.2d 914 (7th Cir. 1985)	7
Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992)	4
DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)	7
Delta v. ALPA, 238 F.3d 1300 (11th Cir. 2001)	8
Garrett v. Fleming, 362 F.3d 692 (10th Cir. 2004)	7
Garvin v. City of Philadelphia, 354 F.3d 215 (3d Cir. 2003)	8
Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980)	4
IAM v. Aloha Airlines, Inc., 790 F.2d 727 (9th Cir. 1986)	7
Mahmud v. Oberman, 508 F. Supp. 2d 1294 (N.D. Ga. 2007)	5
New v. Sports & Recreation, Inc., 114 F.3d 1092 (11th Cir. 1997)	4
Owaki v. City of Miami, 491 F. Supp. 2d 1140 (S.D. Fla. 2007)	5
Sassi v. Breier, 584 F.2d 234 (7th Cir. 1978)	8
Schiff v. Kennedy, 691 F.2d 196 (4th Cir. 1982)	4, 5

TABLE OF AUTHORITIES—Continued

Page

Tapia-Ortiz v. Doe, 171 F.3d 150 (2d Cir. 1999) 8
UTU v. Florida East Coast Ry. Co., 586 F.2d 520 (5th Cir. 1978) 7
Wayne v. Jarvis, 197 F.3d 1098 (11th Cir. 1999) 7
West v. Conrail, 481 U.S. 35 (1987) 7

OTHER AUTHORITIES

5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1321 (3d ed. 2004) 5
2 James Wm. Moore *et al.*, *Moore's Federal Practice* § 10.02[2][d][i] (3d ed. 2007) 5

IN THE

Supreme Court of the United States

No. 07-872

CSX TRANSPORTATION, INC.,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner CSX Transportation, Inc. ("CSXT") filed this lawsuit in July 2005 claiming that the United Transportation Union ("UTU") was orchestrating an illegal work stoppage at a train terminal in Erwin, Tennessee. Included in the case caption as defendants were "John and Jane Doe UTU-Represented CSXT Employees Nos. 1 Through 100, Addresses Unknown." Complaint, RE 1. The district court denied CSXT's motion for a preliminary injunction. The UTU then moved for summary judgment. During the summary judgment briefing, CSXT emphatically assured the district court that "discovery is not

necessary under Fed. R. Civ. P. 56(f)" for it to oppose summary judgment. CSXT Mem. Opp. Mot. Protective Order, Dkt. 52 at 8; *see also id.* at 2. Moreover, at no point did CSXT seek to amend its complaint to identify which of its employees were the "Doe" defendants.

After full briefing and an opportunity for CSXT to supplement the record, the district court issued summary judgment in September 2006. The court found that there was no evidence to support a claim that the UTU was involved in any illegal job action. Addressing CSXT's claim that "individual employees" had engaged in a work stoppage, the district court held that "Plaintiff . . . provided no evidence that any individual employee coordinated or discouraged any trainman from seeking work during the relevant time period," despite the fact that CSXT as their employer had the "authority to investigate individual employee conduct and discipline . . . workers." Pet. 13a. In short, the district court held that CSXT "has not produced any evidence that any illegal job action occurred." Pet. 14a.

CSXT appealed, arguing that triable issues regarding the alleged job action warranted denial of summary judgment, and that the district court should have permitted it to take more discovery before ruling. The court of appeals affirmed, in an unpublished *per curiam* decision. With respect to the discovery issue, the court "reject[ed] CSX's argument . . . because CSX explicitly asked the court to proceed to rule on the summary judgment motion" without waiting for additional discovery. Pet. 2a. With respect to the merits of summary judgment, the court declined to reach the question of whether CSXT had adduced any evidence that a work stoppage occurred

(noting it to be a "close question"), but affirmed instead on the ground that there was no evidence of involvement by the UTU in any work stoppage. Pet. 2a.

Finally, while the issue had not been raised by CSXT at any point either below or on appeal, the court addressed the fact that CSXT had named the "John and Jane Doe" defendants in its Complaint. The court held that this caption is "no impediment to the closing of this case because the Federal Rules do not authorize suit against fictitious parties." Pet. 3a.

CSXT sought rehearing, focusing for the first time on the "John Doe" issue, but "no Judge in regular active service on the Court . . . requested that the Court be polled on rehearing en banc." Pet. 16a.

REASONS FOR DENYING THE WRIT

This case involves the straightforward application of generally-accepted federal court practice to dismiss claims against "John Doe" defendants who remain unidentified after a full opportunity for discovery. CSXT's effort to contrive a circuit split is unavailing, because all circuits would dispose of this case in a similar fashion. Certiorari is also unwarranted because it would not change the outcome below. Even if CSXT obtained the full relief it now seeks, and the case were remanded to the district court for proceedings against the "John Does," such claims would be time-barred. Finally, CSXT's suggestion that the proper operation of the Railway Labor Act in the southeastern United States is imperiled by the footnote in the decision below is unsupportable.

1. Petitioner seeks certiorari on the premise that the Eleventh Circuit has, alone among the appellate

courts, adopted a "rule . . . that a complaint may not include unnamed defendants." Pet. 1. This is not correct. There is no meaningful division among the circuit courts with respect to "John Doe" defendants, particularly when, as here, the issue arises at summary judgment.

Under Eleventh Circuit precedent, when a plaintiff "is unwilling or unable to use a party's real name," or "may be able to describe an individual . . . without stating his name precisely or correctly," he or she is permitted to identify the defendant by a "fictitious name." *Dean v. Barber*, 951 F.2d 1210, 1215-16 (11th Cir. 1992) (citations and quotations omitted). This approach is consistent with that of other courts of appeals. *See, e.g., Billman v. Indiana Dep't of Corrections*, 56 F.3d 785, 789 (7th Cir. 1995); *Gillespie v. Civiletti*, 629 F.2d 637, 643 (9th Cir. 1980); *Schiff v. Kennedy*, 691 F.2d 196, 198 (4th Cir. 1982).

Petitioner asserts that the Eleventh Circuit has formulated a "rule" which "deems the use of unnamed defendants to amount to the prohibited use of 'fictitious parties.'" Pet. 9. But *Dean* makes clear this is not the case, and the decision which purportedly sets forth the challenged "rule," *New v. Sports & Recreation, Inc.*, 114 F.3d 1092 (11th Cir. 1997), did no such thing. The plaintiff in *New* sued "fictitious defendants A, B and C" in addition to others; plaintiff later moved the trial court to strike her own claims against the fictitious parties; the motion was granted, and was not challenged on appeal. 114 F.3d at 1094. Thus, *New* never reached the issue of how to treat "fictitious parties," and there is no evidence that its so-called "rule" has been

applied in any way contrary to the *Dean* decision or, indeed, the decision of other Circuits.[1]

It is also uniformly held, including in the Eleventh Circuit as evidenced by this case, that "eventually the plaintiff must discover the names of the defendants in order to serve summonses on them and thus establish the court's personal jurisdiction, without which the suit must be dismissed." *Billman*, 56 F.3d at 789; *accord*, *Schiff*, 691 F.2d at 198 ("if it does not appear that the true identity of the unnamed party can be discovered . . . the court could dismiss the action"); 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1321 (3d ed. 2004) ("most federal courts typically will allow the use of a fictitious name in the caption so long as it appears that the plaintiff will be able to obtain [the true identity] . . . ; should that not prove to be true, the action will be dismissed"); 2 James Wm. Moore *et al.*, *Moore's Federal Practice* § 10.02[2][d][i] (3d ed. 2007) ("If reasonable inquiry would have revealed the true identity, a pleading naming John Doe defendants will be dismissed.").

The outcome below was entirely consistent with this uniform practice. Petitioner named 100 "John and Jane Doe" defendants when it filed suit, but at

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[1] Petitioner cites a list of district court cases which purportedly adhere to the "rule" of *New*, but the decisions do not reflect this. In the only two published decisions cited by petitioner, the trial courts acknowledged that "fictitious parties" could be sued "when the plaintiff [is] . . . able to describe an individual . . . without stating his name precisely or correctly," *Mahmud v. Oberman*, 508 F. Supp. 2d 1294, 1297 n.1 (N.D. Ga. 2007), but that a "John Doe" who "has never been identified in . . . three and a half years" may be properly dismissed, *Owaki v. City of Miami*, 491 F. Supp. 2d 1140, 1155 (S.D. Fla. 2007).

no point between July 2005 (when it filed suit) and September 2006 (when summary judgment was entered), did it more particularly identify, or name, or serve any of these alleged people. Nor did CSXT oppose summary judgment on the ground that it needed discovery to identify those employees; instead it disavowed the need for discovery.[2] Thus, it could not even conceivably have been erroneous, or in conflict with any judicial decision, for the district court to enter summary judgment and the court of appeals to affirm with respect to the "John Does." There is no basis for this Court to grant the writ in this case.

2. Certiorari is also unwarranted because granting the writ here would not change the outcome of this litigation.

As noted above, the Eleventh Circuit affirmed the district court's holding that there was no evidence that the UTU or any union representative participated in, encouraged or supported any unlawful job action. Petitioner does not challenge that holding, but has limited its further challenge to the treatment of the "John and Jane Doe" defendants. As a practical matter, petitioner would have this Court reverse the Eleventh Circuit and remanded the case to "proceed[] with its RLA suit against the unnamed individual union members on the theory that they had engaged in a forbidden wildcat strike." Pet. 6.

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[2] In contrast to *Bivens* and similar cases where a plaintiff has no way of knowing who may have injured him, CSXT as the employer of the "John Does" knew exactly which of its employees signed up for work and when, and had the contractual authority to investigate the reasons for the timing of their return to work. Nothing prevented CSXT from naming and serving any individual as a defendant in this action.

Such a claim would be untimely. In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), this Court rejected application of state law limitations periods to federal labor law claims, and applied a uniform federal six-month limitations period to labor claims which are akin to unfair labor practice claims.[3] Since *DelCostello*, the courts of appeals have uniformly applied a strict six-month statute of limitations to Railway Labor Act claims such as those advanced by petitioner here. *See Atlas Air, Inc. v. ALPA*, 232 F.3d 218, 226 (D.C. Cir. 2000); *AFA v. Horizon Air Indus., Inc.*, 976 F.2d 541, 548 (9th Cir. 1992); *IAM v. Aloha Airlines, Inc.*, 790 F.2d 727, 734-36 (9th Cir. 1986); *BLE v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914, 919 (7th Cir. 1985).[4]

In this case, the limitations period began to run in July 2005, when the alleged strike took place. By now, in 2008, more than six months have passed and the substitution of named defendants for "John and Jane Does Nos. 1-100" would be denied as untimely. *See Wayne v. Jarvis*, 197 F.3d 1098, 1102-04 (11th Cir. 1999) (claims against named party substituted for a "John Doe" do not relate back to original complaint for limitation purposes); *see also Garrett v. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004)

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[3] In *West v. Conrail*, 481 U.S. 35 (1987), the Court applied *DelCostello* to Railway Labor Act claims.

[4] To be sure, the former Fifth Circuit did hold, in a pre-*DelCostello* decision, that claims under Section 6 of the RLA should be subject to an analogous state law limitations period. *See UTU v. Florida East Coast Ry. Co.*, 586 F.2d 520, 526-27 (5th Cir. 1978). But this approach was squarely rejected by *DelCostello*, which adopted the uniform six-month period as a matter of federal labor policy.

(collecting cases); *Garvin v. City of Philadelphia*, 354 F.3d 215, 220-21 (3d Cir. 2003); *Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 (2d Cir. 1999); *Sassi v. Breier*, 584 F.2d 234, 235 (7th Cir. 1978).

3. Petitioner is also mistaken in urging that either the decision below or the supposed Eleventh Circuit "rule" could hinder application of the Railway Labor Act. As an initial matter, there is no reason for any court to apply a unique rule for "John Doe" defendants in the Railway Labor Act context. Moreover, the Eleventh Circuit has applied the very rule which petitioner urges this Court to adopt in a very similar RLA case.

In *Delta v. ALPA*, 238 F.3d 1300 (11th Cir. 2001), Delta Airlines sued its pilots' union, individual named pilots, and "one hundred 'John Does' and one hundred 'Jane Does,'" seeking an injunction against an ongoing job action. 238 F.3d at 1303 n.9. The Eleventh Circuit directed the district court to enjoin the union and further held that if that injunction was not effective "the district court [sh]ould . . . join all appropriate parties as defendants . . . and enjoin them from engaging in continued activity in violation of the CBA." *Id.* at 1310; *see also id.* at 1311 ("Delta may return to the district court for injunctive relief against individual pilots"). Thus, petitioner's contention that the enforceability of the Railway Labor Act is in jeopardy within the Eleventh Circuit's jurisdiction is simply erroneous.

CONCLUSION

Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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February 1, 2008

FILED
FEB 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-872

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

UNITED TRANSPORTATION UNION ET AL.,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Table of Contents i
Table of Authorities ii
Reply Brief for the Petitioner 1
Conclusion 12
Appendix A 2a
Appendix B 7a

TABLE OF AUTHORITIES

Cases

Arthur v. Maersk, Inc., 434 F.3d 196 (3d Cir. 2006) 9

Aviles v. Pace, No. 7:06-ov-118, 2007 U.S. Dist. LEXIS 25418 (M.D. Ga. Apr. 5, 2007) 3

Barrow v. Wethersfield Police Dep't, 66 F.3d 466 (2d Cir. 1995) 10

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 2, 3

Burnett v. New York Cent. R. Co., 380 U.S. 424 (1965) 11

Chung v. United States Dep't of Justice, 333 F.3d 273 (D.C. Cir. 2003) 11

Colle v. Brazons County, Tex., 981 F.2d 237 (5th Cir. 1993) 8

Dean v. Barber, 951 F.2d 1210 (11th Cir. 1992) 2, 3

Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union, 396 U.S. 142 (1969) 12

Garrett v. L.E. Fleming, 362 F.3d 692 (10th Cir. 2004) 10

Garvin v. City of Phila., 354 F.3d 215 (2003) 9

Green v. Doe, No. 06-20257, 2007 U.S. App. LEXIS 29943 (5th Cir. Dec. 28, 2007) 11

Gulf Winds Fed. Credit Union v. Firestone Bldg. Products Co., No. 3:07-cv-468, 2008 U.S. Dist. LEXIS 9561 (N.D. Fla. Feb. 8, 2008) 4

Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990) 10

Note, Steven S. Sparling, *Relation Back of "John Doe" Complaints in Federal Court: What You Don't Know Can Hurt You*, 19 Cardozo L. Rev. 1235 (1997) 10

Pace v. DiGuglielmo, 544 U.S. 408 (2005) 3, 11

Palmer v. Bd. of Educ., 46 F.3d 682 (7th Cir. 1995 2

Richardson v. Fla. Dept. of Corrs., No. 2:07-cv-388, 2007 U.S. Dist. LEXIS 94078 (M.D. Fla. Dec. 21, 2007) 3, 5

Roper v. Grayson, 81 F.3d 124 (10th Cir. 1996) 7

Singletary v. Cont'l Illinois Nat. Bank & Trust Co. of Chicago, 9 F.3d 1236 (7th Cir. 1993) 11

Singletary v. Pa. Dept. of Corrs., 266 F.3d 186 (2001) 9

Slaughter v. City of Unadilla, No. 5:06-cv-187 (CAR), 2008 U.S. Dist. LEXIS 8350 (M.D. Ga. Feb. 5, 2008) 4

White v. City of Atlanta, 1:07-cv-01739-WSD, 2007 U.S. Dist. LEXIS 93073 (N.D. Ga. Dec. 19, 2007) 5

Zolin v. Caruth, No. 3:07cv538, 2008 U.S. Dist. LEXIS 7039 (N.D. Fla. Jan. 30, 2008) 3, 5

REPLY BRIEF OF THE PETITIONER

The court of appeals dismissed this case against the unnamed individual defendants on the sole ground that Eleventh Circuit law categorically forbids the naming of "Doe" defendants. Respondents make no effort to defend that judgment on the merits. Nor could they. As explained in the petition (Pet. 7-9), that holding is directly contrary to the ruling of every other circuit to consider the question, all of which permit the naming of "Doe" defendants. Respondents instead argue that review should be denied because (i) other circuits would hold on the facts of this case that petitioner's particular use of Doe defendants was improper (BIO 5-6), and (ii) the Eleventh Circuit's error was harmless because the statute of limitations has now run on petitioner' claims (BIO 6-8). Those arguments are not only wrong, but also have no bearing on whether this Court's review is appropriate. Speculation about whether, if the Eleventh Circuit adopted and applied a correct standard of law, petitioner's complaint might ultimately be dismissed, does not undercut the importance of reviewing that court's broadly applicable rule of law that both denied petitioner the individualized consideration to which it was entitled and will continue to deny such individualized consideration in every case arising within the Eleventh Circuit's jurisdiction, unless reversed by this Court. Accordingly, the petition for a writ of certiorari should be granted. Indeed, decision of the court departs so far from established precedent that summary reversal may be appropriate.

1. At the outset, it is telling that respondents do not defend the merits of the ruling below. The Eleventh Circuit has never identified a basis for its gen-

eral prohibition on Doe defendants, and respondents apparently cannot devise one either. The Eleventh Circuit's rule is contrary to the practice of this Court (*e.g.*, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390, n.2 (1971)), federal statutory schemes (*e.g.*, 28 U.S.C. § 1144(a)), and bedrock principles of civil procedure. *See* Pet. 11-13. In particular, it has no footing in either the text or purposes of the governing Rule of Civil Procedure (Fed. R. Civ. P. 10), and the Rules' framers could not have intended to erect such an unnecessary procedural hurdle that may make it "impossible as a practical matter to obtain complete relief" (*Palmer v. Bd. of Educ.*, 46 F.3d 682, 688 (7th Cir. 1995)). There is accordingly no serious question that the decision below – and the long line of authority in the courts of the Eleventh Circuit routinely dismissing Doe defendants as a matter of law – is erroneous.

2. The petition fully anticipated respondents' passing attempt to invoke *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992), to argue that the Eleventh Circuit does in fact permit citations naming Doe defendants. *See* Pet. 11 n.4. *Dean* involved the special circumstance of a *pro se* plaintiff (given that "pleadings of *pro se* plaintiffs are treated with special care," 951 F.2d at 1215-16) who moreover in his complaint identified the particular defendant in question *by title*, just not by name, such that the defendant could be served. 951 F.2d at 1215. The *Dean* decision has been strictly limited to at least the latter circumstance. *See, e.g.*, *Zolin v. Caruth*, No. 3:07cv538, 2008 U.S. Dist. LEXIS 7039, at *3 (N.D. Fla. Jan. 30, 2008) (dismissing Doe defendants, reasoning that *Dean* is limited to circumstance in which defendant is

identified with sufficient specificity in the complaint "to be served"); *Richardson v. Fla. Dept. of Corrs.*, No. 2:07-cv-388, 2007 U.S. Dist. LEXIS 94078, at *4 (M.D. Fla. Dec. 21, 2007) (dismissing Doe defendant, deeming designation of defendant as prison guard insufficiently definite under *Dean*); *Aviles v. Pace*, No. 7:06-ov-118, 2007 U.S. Dist. LEXIS 25418 (M.D. Ga. Apr. 5, 2007) (dismissing Doe defendants, reasoning that, notwithstanding *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), *Dean* permits Doe defendants only if "a plaintiff provides sufficient information for service of process to issue").

Two further points illustrate that respondents' characterization of *Dean* is incorrect. First, if the Eleventh Circuit did in fact freely permit Doe designations, it would not have held (Pet. App. A at 3a n.1) that petitioner's complaint in this case was properly dismissed on that basis. Second, respondents do not dispute that the district courts in the Eleventh Circuit recognize that court's broad prohibition on Doe defendants. *See* Pet. 9-11 (citing more than two dozen examples within the last year alone).[1]

Respondents also note that the Eleventh Circuit's decision in *New v. Sports & Recreation, Inc.*, 114 F.3d 1092 (1997), does not itself necessarily dictate a broad prohibition on Doe defendants. BIO 4. That is a fair point, and it was one of petitioner's principal

[1] Respondents ignore 23 of the 25 cases cited by petitioner on the apparent theory that only "published" district court decisions are relevant. BIO 5. That assertion ignores not only that most district court rulings are unpublished, but more importantly that the point of the rulings cited by the petition is to demonstrate the district courts' clear understanding of the Eleventh Circuit's rule and the great frequency with which the issue arises. Respondents dispute neither point.

arguments in seeking en banc review. But time has passed that view of *New* by, as the denial of rehearing en banc in this case illustrates. Subsequent rulings of the Eleventh Circuit and – equally important for both understanding the court of appeals' rule and recognizing the practical importance of the question presented – a massive tide of district court authority in that circuit has read *New* much more broadly. For examples in only the past few months, see Pet. App. A at 3a n.1; *Gulf Winds Fed. Credit Union v. Firestone Bldg. Products Co.*, No. 3:07-cv-468, 2008 U.S. Dist. LEXIS 9561, at *24 (N.D. Fla. Feb. 8, 2008); *Slaughter v. City of Unadilla*, No. 5:06-cv-187 (CAR), 2008 U.S. Dist. LEXIS 8350, at *2 (M.D. Ga. Feb. 5, 2008); *Zolin v. Caruth*, No: 3:07cv538/RV/EMT 2008, U.S. Dist. LEXIS 7039, at *3-*4 (N.D. Fla. Jan. 30, 2008); *Richardson v. Fl. Dept. of Corrs.*, No. 2:07-cv-388-FtM-34DNF, 2007 U.S. Dist. LEXIS 94078, at *4 (M.D. Fla. Dec. 21, 2007); *White v. City of Atlanta*, 1:07-cv-01739-WSD, 2007 U.S. Dist. LEXIS 93073, at *11-*12 (N.D. Ga. Dec. 19, 2007).

3. Respondents argue that other circuits would hold that the Doe defendants here were properly dismissed because petitioner was insufficiently diligent in identifying them. If respondents mean to highlight the fact that other circuits apply a flatly contrary rule of law to that adopted by the Eleventh Circuit here and individually examine the necessity and propriety of Doe defendants on a case-by-case basis, then we are in agreement that there is a conflict in the circuits and this Court's review is necessitated. But respondents' further suggestion that the Eleventh Circuit's outlier rule of law should not be reviewed or reversed because of petitioner's purported

lack of diligence is without basis and, indeed, defies the record in this case.

Petitioner filed its complaint on July 18, 2005 and secured a temporary restraining order. The district court subsequently declined to issue an injunction based, *inter alia*, on its view that petitioner had "failed to prove any actual work stoppage had occurred." Pet. App. B at 7a. Respondents then moved for summary judgment on the ground that no work stoppage had occurred. Petitioner, in turn, promptly sought discovery of the named defendants (the union and its officer) to determine which employees were involved in the work stoppage. Petitioner thus diligently sought information on all communications between the Union and its members regarding whether the members should make themselves available for work at the conclusion of the relevant track "curfew." App., *infra* (reproducing Pl. CSX Transp., Inc.'s 1st Set of Interrog., Nos. 2, 3; CSX Transp., Inc.'s 1st Req. for Production of Docs. 1, 4, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17, 27, 28, 30). Petitioner's efforts did not stop there – petitioner also sought to subpoena relevant telephone records. *See* Mem. in Support of the UTU's (Second) Motion for a Protective Order, *CSX Transp., Inc. v. United Transp. Union*, No. 3:05-CV-672 (M.D. Fla.).

Respondents, however, refused to provide any discovery, and sought a protective order, which petitioner opposed. Respondents then argued that discovery should be stayed "pending a ruling on the UTU's motion for summary judgment," and specifically arguing that discovery concerning the union's contacts with "some 120 union members" would be too burdensome. Mem. in Support of the UTU's Mo-

tion for a Protective Order at 2, *CSX Transp., Inc. v. United Transp. Union*, No. 3:05-CV-672 (M.D. Fla.).

Even after the district court denied respondents' motion, respondents refused to provide the requested telephone records. Petitioner then filed a motion to compel their production. Petitioner also served subpoenas on individual union members seeking both the production of documents and to take their depositions. But respondents filed a motion to quash those subpoenas. The district court never acted on these discovery motions.

The case was then stalled before the district court pending the disposition of respondents' motion for summary judgment, despite petitioner's best efforts to secure discovery regarding the participation of individual union members in the alleged work stoppage. The district court did not finally resolve respondents' motion for summary judgment until September 25, 2006. Pet. App. B at 14a. It then dismissed the case in full, without ever ruling on the discovery motions, and petitioner appealed.

The record thus demonstrates that the lack of information needed to identify the Doe defendants is the product of respondents' obstruction, not petitioner's lack of diligence. At every stage, petitioner did everything possible to identify through discovery which union members had participated in the work stoppage, only to be greeted with refusals to comply and requests to stay by respondents. *Contra* BIO 6 n.2 (suggesting that petitioner could have named any union member who did not report for work as a defendant, despite lacking proof that the employees were absent for unlawful reasons).

Respondents' further contention that petitioner did not "more particularly identify, or name, or serve any of these alleged people" (BIO 6) misunderstands the relevant inquiry, which is whether petitioner diligently sought to identify the Doe defendants and to obtain the information necessary to take the steps that respondents outline, which petitioner did at every turn. *E.g.*, *Roper v. Grayson*, 81 F.3d 124, 126 (10th Cir. 1996) (citing *Colle v. Brazons County, Tex.*, 981 F.2d 237, 243 (5th Cir. 1993) (dismissal appropriate when "defendants remained unnamed for three years")).

Likewise, respondents statement that petitioner "disavowed the need for discovery" (BIO 6) is simply wrong. In fact, petitioner diligently sought discovery on the identity of the Does (*supra*) and asserted the need to take this discovery throughout the district court proceedings. Petitioner only stated narrowly that further discovery was not necessary (given the facts already adduced through the injunction hearings) to determine whether summary judgment was appropriate on the question whether there had been a work stoppage.

4. Nor is there any further merit to respondents' argument that the question presented is irrelevant to the disposition of this case because the statute of limitations has run. Respondents do not dispute that petitioner timely filed its complaint. Instead, they argue that, if this case were returned to the district court so that petitioner could take the discovery it promptly sought but was never granted, the court would inevitably deny leave to amend the complaint to name individual union members because the limitations period has long since run. In support, respondents rely on the principle that "claims against

[a] named party substituted for a 'John Doe' do not relate back to [the] original complaint for limitations purposes." BIO 7.

Preliminarily, the relation-back question is not presented by the petition, nor of course was it decided by the Eleventh Circuit. That issue properly can be resolved by the court of appeals or district court on remand. On respondents' contrary view of the exercise of this Court's jurisdiction, the Eleventh Circuit's rule will almost certainly *forever* evade review because it is all but impossible to imagine a case that will – within the applicable limitations period – be filed, dismissed, briefed and decided in the Eleventh Circuit, petitioned to this Court, briefed and decided here on the merits, remanded for discovery regarding the Doe defendants, and then amended to name the parties as identified through discovery. Respondents statement that "[b]y now, in 2008, more than six months [the limitations period under the Railway Labor Act] has passed" (BIO 7) thus rings quite hollow.

But in any event, the prospect that this Court would reach the question whether the amendment would "relate back" to the original filing of petitioner's complaint is a reason to *grant* review, not deny it. Respondents fail to recognize that the question is the subject of a well-recognized and recurring conflict in the circuits. So long as the plaintiff has been diligent in seeking to identify Doe defendants, the Third Circuit permits relation back (*e.g.*, *Garvin v. City of Phila.*, 354 F.3d 215 (2003)[2]; *Singletary v.*

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[2] Respondents thus cite the Third Circuit's decision in *Garvin* for precisely the opposition proposition for which it actually stands. BIO 8.

Pa. Dept. of Corrs., 266 F.3d 186, 200-01 (2001)), expressly recognizing that its rule conflicts with decisions of other circuits (*Arthur v. Maersk, Inc.*, 434 F.3d 196, 211 (2006) (recognizing conflict with "*e.g.*" *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 469 (2d Cir. 1995), *amended by* 74 F.3d 1366 (2d Cir. 1996))). *See also, e.g.*, *Garrett v. L.E. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004) (recognizing the split); Note, Steven S. Sparling, *Relation Back of "John Doe" Complaints in Federal Court: What You Don't Know Can Hurt You*, 19 Cardozo L. Rev. 1235 (1997) (same; arguing that Third Circuit's interpretation is correct).

But even if an amendment of petitioner's complaint did not formally "relate back," it would be permitted on the ground that petitioner's immediate filing of the complaint and diligent efforts to identify the Doe defendants *tolled* the applicable limitations period. It is commonplace that statutes of limitations under federal causes of action generally may be tolled (*Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95 (1990)), and the Railway Labor Act is no exception (*West v. Conrail*, 481 U.S. 35 (1985)). As discussed *supra*, in this case, petitioner could not have been more diligent in attempting to discover the Doe defendants. On that basis, the limitations period would have been tolled. *See, e.g.*, *Green v. Doe*, No. 06-20257, 2007 U.S. App. LEXIS 29943 (5th Cir. Dec. 28, 2007) (without regard to relation back; amendment to identify Doe defendants permitted under principles of equitable tolling because district court did not permit discovery); Fed. R. App. P. 32.1 (citation to unpublished opinions is permitted). *See generally Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (equitable tolling applies when plaintiff "has been pursuing his

rights diligently" but "some extraordinary circumstance stood in his way"); *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 429 (1965) (plaintiff entitled to equitable tolling where plaintiff "did not sleep on his rights"); *Chung v. United States Dep't of Justice*, 333 F.3d 273, 279 (D.C. Cir. 2003) (equitable tolling "ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit"); *Singletary v. Cont'l Illinois Nat. Bank & Trust Co. of Chicago*, 9 F.3d 1236 (7th Cir. 1993) (equitable tolling applies when a plaintiff has been "unable despite all reasonable diligence . . . to learn the wrongdoer's identity").

5. Finally, respondents err in their assertion (BIO 8) that this case is insufficiently important to warrant this Court's attention. The avalanche of district court authority collected in the petition demonstrates that the Eleventh Circuit's rule has tremendous ongoing consequences for the course of federal court litigation. Pet. 9-11. The petition also demonstrated that the ruling below threatens to seriously impede the efficacy of the Railway Labor Act in the southeastern United States, undermining Congress's determination to prevent the "wasteful strikes and interruptions" that threaten the nation's commerce (*Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142 (1969)). *See* Pet. 13-15.

The leading organizations representing both the nation's railroads and its airlines in labor matters have notably filed an *amicus curiae* brief reinforcing that conclusion and attesting to the serious consequences of the ruling in this case. Those organizations correctly recognize that, by effectively precluding naming individual union members as defendants in RLA actions, the ruling below "seriously hampers

the ability of rail and air carriers to secure emergency relief against wildcat strikes and other job actions in which the union's role is ambiguous or concealed," because the individual members' participation in wildcat actions is very difficult for carriers to discern absent discovery. Br. for the National Railway Labor Conf. and the Airline Indus. Rela. Conf. 2.

Respondents hope to suggest that the inability to name Doe defendants is immaterial under the RLA because in *Delta v. ALPA*, 238 F.3d 1300, 1310 (11th Cir. 2001), the airline named Doe defendants and the court of appeals held that an injunction in the case could extend to "all appropriate parties." That assertion mischaracterizes *Delta*, in which the airline's complaint included "several individual pilots" as *named* defendants (*id.* at 1304), which explains the court's statement that the airline could seek "injunctive relief against individual parties" (BIO 8). Although respondents are correct that the complaint also named Doe defendants, the court of appeals never approved that practice, directly or indirectly. If Eleventh Circuit precedent in fact permitted Doe defendants, it would not have affirmed the dismissal of the complaint in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

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APPENDIX

TABLE OF CONTENTS

Appendix A 2
Appendix B 7

Appendix A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CSX TRANSPORTATION, INC.,
Plaintiff

v.

UNITED TRANSPORTATION UNION, *et al.*,
Defendants.

Case No. 3:05-cv-00672-HLA-TEM

CSX TRANSPORTATION, INC.'S

FIRST REQUEST FOR

PRODUCTION OF DOCUMENTS

* * * *

Request No. 1: All notices, agencies, notes, minutes, memoranda, or other DOCUMENTS RELATING TO any meeting where DEFENDANTS or UNION MEMBERS attended, learned of, or discussed the CURFEW.

* * * *

Request No. 4: All letters, e-mails or other COMMUNICATION to or from DEFENDANTS or UNION MEMBERS RELATING TO the CURFEW.

* * * *

Request No. 6: All notices, agendas, notes, minutes, memoranda or other DOCUMENTS RELATING TO any meeting during which the subject of trainmen not making themselves available for work at CSXT at the end of the CURFEW or in the two weeks immediately after the CURFEW ended was discussed.

* * * *

Request No. 8: All DOCUMENTS RELATING TO any COMMUNICATION by or with DEFENDANTS or UNION MEMBERS CONCERNING trainmen not making themselves available for work at CSXT at the end of the CURFEW or in the two weeks immediately after the CURFEW ended.

Request No. 9: All other DOCUMENTS or COMMUNICATIONS CONCERNING trainmen not making themselves available for work at CSXT at the end of the CURFEW or in the two weeks immediately after the CURFEW ended.

Request No. 10: All DOCUMENTS CONCERNING any efforts by DEFENDANTS to advise, persuade, or convince, or to attempt to advise, persuade, or convince trainmen not to make themselves available for work at CSXT after the CURFEW ended.

Request No. 11: All DOCUMENTS RELATING TO any COMMUNICATION between CSXT and DEFENDANTS CONCERNING any efforts by DEFENDANTS to advise, persuade, or convince, or to attempt to advise, persuade, or convince trainmen not to make themselves available for work at CSXT after the CURFEW ended.

Request No. 12: All DOCUMENTS RELATING TO any COMMUNICATION by or with DEFENDANTS and UNION MEMBERS CONCERNING any efforts by DEFENDANTS to advise, persuade, or convince, or to attempt to advise, persuade, or convince trainmen not to make themselves available for work at CSXT after the CURFEW ended.

Request No. 13: All COMMUNICATIONS by or with DEFENDANTS or UNION MEMBERS RELATING TO any efforts by DEFENDANTS to advise, persuade, or convince, or to attempt to advise, persuade, or convince trainmen not to make themselves available for work at CSXT after the CURFEW ended.

Request No. 14: All DOCUMENTS CONCERNING any efforts by DEFENDANTS to advise, persuade, or convince, or to attempt to advise, persuade, or convince trainmen to make themselves available for work at CSXT after the CURFEW ended.

* * * *

Request No. 16: All DOCUMENTS RELATING TO any COMMUNICATION between DEFENDANTS and UNION MEMBERS CONCERNING any efforts

by DEFENDANTS to advise, persuade, or convince, or to attempt to advise, persuade, or convince trainmen to make themselves available for work at CSXT after the CURFEW ended.

Request No. 17: All COMMUNICATIONS by or with DEFENDANTS or UNION MEMBERS RELATING TO any efforts by DEFENDANTS to advise, persuade, or convince, or to attempt to advise, persuade, or convince trainmen to make themselves available for work at CSXT after the CURFEW ended.

* * * *

Request No. 27: All cellular, home, or business telephone records of any official, officer, or member of the UTU General Committee of Adjustment CSX Transportation (L&N Proper.) or UTU Local # 1162 for the period of July 1 through July 29, 2005, INCLUDING, but not limited to, telephone bills or invoices, telephone logs or other DOCUMENTS reflecting the time any telephone call was made or received, the duration of any telephone call made or received, whether the telephone call was answered or unanswered, or the telephone numbers of callers and call recipients for all local, toll and long distance telephone calls.

Request No. 28: All DOCUMENTS, including, but not limited to, any telephone messages, notes, or memoranda RELATING TO any local, toll, or long distance telephone calls received or made by any official, officer or member of the UTU General Committee of Adjustment CSX Transportation (L&N Proper.) or UTU Local # 1162 CONCERNING the CURFEW, for the period of July 1 through July 29, 2005.

* * * *

Request No. 30: All DOCUMENTS RELATING TO any COMMUNICATION by or with DEFENDANTS or UNION MEMBERS from and including June 1, 2005 through the present RELATING TO the allegations in the COMPLAINT or the defenses set forth in DEFENDANTS' Answer dated August 8, 2005.

* * * *

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CSX TRANSPORTATION, INC.,
Plaintiff

v.

UNITED TRANSPORTATION UNION, *et al.*,
Defendants.

Case No. 3:05-cv-00672-HLA-TEM

CSX TRANSPORTATION, INC.'S

FIRST SET OF INTERROGATORIES

TO DEFENDANTS

* * * *

Interrogatory No. 2:

IDENTIFY all PERSONS who engaged in any COMMUNICATION with the UNION MEMBERS, or assisted or participated in efforts to engage in any

COMMUNICATION with the UNION MEMBERS, CONCERNING:

(a) the UNION MEMBERS making themselves available for work at CSXT during the CURFEW, at the end of the CURFEW, or in the two weeks immediately after the CURFEW ended; or

(b) the UNION MEMBERS not making themselves available for work at CSXT during the CURFEW, at the end of the CURFEW, or in the two weeks immediately after the CURFEW ended; or

(c) any RESPONSE to the CURFEW by DEFENDANTS or the UNION MEMBERS; or

(d) the Temporary Restraining Order issued by the Court on or about July 20, 2005.

Response to Interrogatory No. 2:

Interrogatory No. 3:

For each PERSON identified in response to Interrogatory No. 2, DESCRIBE IN DETAIL the COMMUNICATION that occurred.

Response to Interrogatory No. 3:

* * * *

Supreme Court, U.S.
FILED
FEB 4 - 2008
OFFICE OF THE CLERK

No. 07-872

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

UNITED TRANSPORTATION UNION *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AND THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. The Eleventh Circuit's Rule Undermines the Railway Labor Act's Purpose of Preventing Illegal Strikes 3

1. Rail and Air Strikes Harm Interstate Commerce 3

2. Carriers Rely on the RLA to Deter and Prevent Illegal Strikes 7

B. Carriers Must Be Able to Name John and Jane Does When Seeking an Emergency Injunction Against a Wildcat Strike 9

C. The Eleventh Circuit's Rule Has Nothing to Recommend It 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES: **PAGE**

Air Line Pilots Ass'n Int'l v. Civil Aeronautics Board, 502 F.2d 453 (D.C. Cir. 1974) 4

Air Line Pilots Ass'n., Int'l v. United Air Lines Corp., 874 F.2d 439 (7th Cir. 1989) 4-5

American Airlines, Inc. v. Allied Pilots Ass'n, 53 F. Supp. 2d 909 (N.D. Tex. 1999), *aff'd*, 228 F.3d 574 (5th Cir. 2000) 4, 6

Amtrak v. TWU, 373 F.3d 121 (D.C. Cir. 2004) 8

BMWE v. Atchison T. & S.F. Ry., 138 F.3d 635 (7th Cir. 1997) 8

BMWE v. Union Pacific R.R., 358 F.3d 453 (7th Cir. 2003) 8

BMWE v. Union Pacific R.R., 460 F.3d 1277 (10th Cir. 2006) 8

Brotherhood of R.R. Trainmen v. Chicago River & I. R.R., 353 U.S. 30 (1957) 7, 8

Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 7-8

Burlington Northern Santa Fe Ry. v. BMWE, 286 F.3d 803 (5th Cir. 2005) 8

Chicago & Northwestern Transp. Co. v. Ry. Labor Executives' Ass'n, 908 F.2d 144 (7th Cir. 1990) 4

Consolidated *Rail Corp. v. RLEA*, 491 U.S. 299 (1989) 8

Delta Air Lines v. Air Line Pilots Ass'n, 238 F.3d 1300 (11th Cir. 2001).....5-6, 9, 10

Detroit & Toledo Shore Line R.R. v. United Transp. Union, 396 U.S. 142 (1969).....7

McAllister v. Henderson, 698 F. Supp. 865 (N.D. Ala. 1988).....12

New v. Sports & Recreation, Inc., 114 F.3d 1092 (11th Cir. 1997).....11

Norfolk Southern Ry. Co. v. Brotherhood of Locomotive Engineers, 217 F.3d 181 (4th Cir. 2000).....8

Railway Clerks v. Florida East Coast Ry., 384 U.S. 238 (1966).....5, 7

Texas & New Orleans R.R. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548 (1930).....7

Union Pacific R.R. v. Sheehan, 439 U.S. 89 (1978).....7

United Air Lines v. International Ass'n of Machinists & Aerospace Workers, 243 F.3d 349 (7th Cir. 2001).....9

United Mine Workers v. Gibbs, 383 U.S. 715 (1966).....9

Weeks v. Benton, 649 F. Supp. 1297 (S.D. Ala. 1986).....11

Wiggins v. Risk Enter. Mgmt. Ltd., 14 F. Supp. 2d 1279 (M.D. Ala. 1998).....11

STATUTES:

Railway Labor Act, 45 U.S.C. § 151 *et seq.* 6

45 U.S.C. § 151a 7

45 U.S.C. § 152 Second 7

45 U.S.C. § 153 First (i) 7

29 U.S.C. § 106 9

RULES:

Fed. R. Civ. P. 15(c) 12

OTHER AUTHORITIES:

U.S. Census Bureau, Statistical Abstract of the United States: 2008 (127th ed. 2007) 5

INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT[1]

The National Railway Labor Conference is an unincorporated association of all of the nation's Class I freight railroads and a number of smaller freight railroads. It represents member railroads in multi-employer collective bargaining under the Railway Labor Act and in regard to other labor-related matters of concern to the railroad industry generally.

The Airline Industrial Relations Conference is an unincorporated association of most of the major scheduled air carriers in the United States. Its purpose is to facilitate the exchange of information concerning personnel and labor issues and to represent its members in connection with legislative, judicial, and administrative proceedings regarding labor issues.

The ruling below – delivered in a footnote in an unpublished decision – might not appear at first glance to be an obvious candidate for certiorari. But this footnote represents the application of a settled rule in the Eleventh Circuit prohibiting "John and Jane Doe" defendants, making this a case of vital

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. The parties have consented to the filing of this brief in letters of consent on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made such a contribution.

importance to the entire railroad and airline industries and to the public they serve. The Eleventh Circuit's rule threatens to have a pernicious and far-reaching adverse impact on commerce in the Southeast and across the Nation, for it seriously hampers the ability of rail and air carriers to secure emergency relief against wildcat strikes and other job actions in which the union's role is ambiguous or concealed. When a strike occurs, speed is of the essence: a quick halt to the illegal activity is essential in order to avoid damage to the carrier, its shippers or passengers, and the public at large. Because a railroad or airline facing a wildcat strike does not always have time to determine which of its employees are absent from work for legitimate reasons, it must name John and Jane Doe defendants.

There are no countervailing considerations in support of the Eleventh Circuit's rule. The Doe defendants are not "fictitious" in the sense that they are imaginary. Rather, those names are simply placeholders, used only until the carrier learns which of its employees are acting illegally. No cognizable interests are harmed by allowing a carrier to proceed initially against John and Jane Does and then to name specific individuals as their identities are ascertained.

Accordingly, before application of the Eleventh Circuit's ill-conceived rule causes significant damage to rail or air carriers and their customers, this Court

should grant review and reverse.[2] Indeed, because the Eleventh Circuit's ruling is so clearly incorrect, this case is a fitting one for summary reversal.

ARGUMENT

A. The Eleventh Circuit's Rule Undermines the Railway Labor Act's Purpose of Preventing Illegal Strikes.

1. Rail and Air Strikes Harm Interstate Commerce.

The significance of this case arises from its potential impact on the vital and long-standing national policy of avoiding interruptions to rail and air service caused by labor unrest. For decades, both Congress and the courts have recognized that strikes and other forms of work stoppages in the rail and air industries can cause massive and irreparable harm to carriers, their customers, and the public at large.

Strikes against rail and air carriers are particularly devastating because, "[u]nlike manufacturing industries and even some service industries, the transportation industry does not

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[2] In Florida, Georgia, and Alabama, the states covered by the Eleventh Circuit, four Class I Railroads (CSX, Norfolk Southern, Grand Trunk, and BSNF) operate over nearly 8,000 miles of track; two regional railroads operate over 775 miles; and thirty local and switching railroads operate over nearly 1,500 miles. They carried more than 9 million carloads of freight in 2007. Over 15,000 rail employees live in those three states. Likewise, 14 major airlines operate in those jurisdictions, carrying millions of passengers per year. Major air traffic hubs in the Eleventh Circuit include Atlanta – the nation's busiest airport – Orlando, Miami, Tampa, and Fort Lauderdale.

produce a storable commodity, and so it cannot produce inventory in anticipation of a strike or accelerate production afterward to make up for lost production during the strike. It is therefore peculiarly vulnerable to a strike." *Chicago & Northwestern Transp. Co. v. Railway Labor Executives Ass'n*, 908 F.2d 144, 148 (7th Cir. 1990) (Posner, J.); *see also, e.g., Air Line Pilots Ass'n Int'l v. Civil Aeronautics Board*, 502 F.2d 453, 458 (D.C. Cir. 1974) (noting that "the air transport industry suffers a greater impact by strike than do other industries and is therefore more vulnerable to strike[s]"); *American Airlines, Inc. v. Allied Pilots Ass'n*, 53 F. Supp. 2d 909, 936 (N.D. Tex. 1999) (finding that losses to carrier as a result of 10-day work stoppage were approximately $200 to 250 million), *aff'd*, 228 F.3d 574 (5th Cir. 2000).

Moreover, economic warfare against even one major carrier can cause nationwide disruptions of vital transportation services. Rail carriers exchange traffic with one another at hundreds of interchange points across the country, and shutdowns and delays on one system quickly cause havoc on the others as well. Cars pile up on the sidings, traffic must be rerouted, crucial timetables are destroyed, connections are missed, and critical delivery obligations cannot be met. Other carriers are thereby deprived of revenue and customer goodwill.

The airline industry is vulnerable to similar ripple effects from a strike against a single carrier. Disruptions on one major system – even if localized at a single hub – can cause delays and cancellations across the nation. *See Air Line Pilots Ass'n, Int'l v. United Air Lines Corp.*, 874 F.2d 439, 444 (7th Cir.

1989) (referring to "major disruption[s]" caused by airline strike).

Nor is it just the carriers that suffer from an interruption to service. The carriers' customers – as well as the general public – are victims as well. The railroads transport coal, ore, autos, steel chemicals, food stuffs, perishable produce, mail, fuel, medical equipment, military hardware, and a wide array of other commodities that are essential to the health and welfare of citizens across the United States and Canada.[3] As this Court recognized in *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 245 (1966):

> In our complex society, metropolitan areas in particular might suffer a calamity if rail service for freight or for passengers were stopped. Food and other critical supplies might be dangerously curtailed; vital services might be impaired; whole metropolitan communities might be paralyzed.

The same is true of the airline industry. Every day, the airlines transport thousands of passengers, many of whom have no alternative to air transportation. In addition, a huge volume of mail and time-sensitive cargo is transported daily by air. Disruptions to these services as a result of labor unrest can have enormous costs for those who depend on timely delivery. *See, e.g., Delta Air Lines v. Air Line Pilots Ass'n*, 238 F.3d 1300 (11th Cir. 2001) (noting that a

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[3] In 2006 alone, the nation's major rail carriers transported 149 million tons of farm products, 61 million tons of ore, 852 million tons of coal, 141 million tons of minerals, 105 million tons of food, 43 million tons of lumber, and 167 million tons of chemicals. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2008 (127th ed. 2007) at 696.

total of 715,000 passengers were affected by cancelled flights due to job action); *American Airlines*, 53 F. Supp. 2d at 915 (finding that one-day work stoppage caused cancellation of 1200 flights).

In short, a strike inevitably threatens substantial and irreparable harm to hundreds of thousands of shippers, commuters, and other individuals across the country who depend – directly or indirectly – on air and rail transportation.[4]

Finally, a full or partial shutdown of a rail or air carrier can inflict substantial and irreparable injury on the employees of the carrier – and of connecting carriers – who were not parties to the strikers' grievance (such as the locomotive engineers in this case, who were deprived of the opportunity to crew the trains that could not run during the work stoppage).

The irreparable injury to a carrier and its employees and the severe economic consequences to the national and local economies that result from a strike were the principal reasons for enactment of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA").

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[4] Many companies served by the rail industry, such as automobile assembly plants, operate on a "just-in-time" basis for deliveries, meaning that they have no inventory on which to draw in the event of shipment delays. Thus, even brief disruptions in rail service could lead to interruption or shutdown of basic industries.

2. *Carriers Rely on the RLA to Deter and Prevent Illegal Strikes.*

The primary stated purpose of the RLA is "to avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a; *see also Texas & New Orleans R.R. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548, 565 (1930) ("[T]he major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes."). The Act accomplishes that purpose by channeling different kinds of labor disputes into specialized forms of mandatory dispute resolution procedures. So-called "minor disputes" involve the interpretation or application of existing collective bargaining agreements. *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978). These disputes are subject to mandatory conference and arbitration procedures. 45 U.S.C. §§ 152 Second, 153 First (i). Attempts to circumvent these procedures by striking are unlawful and may be enjoined, notwithstanding the Norris LaGuardia Act. *Brotherhood of R.R. Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30 (1957).

"Major" disputes are disputes over the formation or amendment of collective bargaining agreements, and are subject to negotiations, conferences, mediation, voluntary arbitration, and the possible creation of an emergency board by the President. These major dispute procedures are "purposely long and drawn out," *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), their exhaustion is "an almost interminable process," *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 149 (1969), and until they are exhausted a carrier may

not implement changes and the employees may not strike. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

Notwithstanding the mandatory nature of these dispute resolution procedures, unions – well aware of the carriers' sensitivity to work stoppages – sometimes use strikes (or threats of strikes) to increase their leverage in labor disputes. *See, e.g., Burlington Northern Santa Fe Ry. v. BMWE,* 286 F.3d 803 (5th Cir. 2005) (discussing one union's long history of launching illegal "surprise strikes" and work stoppages). To be sure, courts routinely enjoin such actions as violations of the RLA. *See, Chicago River*, 353 U.S. at 40-42.[5] But even if they know that the strike will be enjoined, unions have little to lose from attempting to bring economic pressure to bear upon a carrier, especially in light of lower court rulings that carriers may not recover damages caused by illegal strikes.[6] The result is that carriers and unions are often engaged in a high-stakes footrace, as the carrier tries to secure an emergency injunction before an impending job action takes

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[5] *See also, e.g., Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 304 (1989) (holding that courts may enjoin strikes arising from minor disputes); *BMWE v. Union Pacific R.R.*, 460 F.3d 1277 (10th Cir. 2006) (upholding strike injunction); *Amtrak v. TWU*, 373 F.3d 121 (D.C. Cir. 2004) (holding that threatened one-day strike is illegal and enjoinable); *BMWE v. Union Pacific R.R.*, 358 F.3d 453 (7th Cir. 2003) (upholding strike injunction); *BMWE v. Atchison T. & S.F. Ry.*, 138 F.3d 635 (7th Cir. 1997) (minor dispute strike is illegal and may be enjoined).

[6] *See, e.g., Norfolk Southern Ry. Co. v. Brotherhood of Locomotive Engineers*, 217 F.3d 181 (4th Cir. 2000) (citing cases).

place, while the union attempts to organize a walk-out before the carrier can get to court.

B. Carriers Must Be Able to Name John and Jane Does When Seeking an Emergency Injunction Against a Wildcat Strike.

Because they know that courts will usually put a stop to a strike as soon as a carrier can present a motion for a temporary restraining order, unions have, in recent years, become more sophisticated in their approach to the use of economic force. They have increasingly employed tactics such as slow-downs, sick-outs, and work-to-rule campaigns, which – as the case at bar demonstrates – are harder to identify and prove. *See, e.g., United Air Lines v. International Ass'n of Machinists & Aerospace Workers*, 243 F.3d 349 (7th Cir. 2001) (involving "work safe" slow-down); *Delta Air Lines*, 238 F.3d at 1302-03 (concerted "no-overtime" campaign by pilots).

Unions may also evade injunctions against illegal job actions that are undertaken – in truth or pretence – without their authorization. When a union disclaims responsibility for a so-called "wildcat" strike, a carrier may not be able to stop the action by the usual means of a temporary restraining order against the union. *See* 29 U.S.C. § 106 (requiring proof of participation, authorization or ratification of unlawful acts by union); *cf. also United Mine Workers v. Gibbs*, 383 U.S. 715, 737 (1966) (requiring clear and convincing proof of union involvement in illegal strike activities). In these circumstances, the carrier's only immediate alternative is to sue the employees themselves.

But doing so is difficult as a practical matter. Speed is a critical factor in stopping a strike or a slowdown. The effects of any sudden work stoppage spread like wildfire, rippling out from the point of origin to paralyze an ever-increasing segment of the nation's transportation system. Just as a blizzard at O'Hare Airport in Chicago quickly disrupts air travel across the nation, the impact of any work stoppage will rapidly be felt throughout the affected rail or air network. The longer such disruptions last, the more damage they do and the harder it becomes to put the system back on track. The effects of a stoppage lasting only a few hours can be felt for weeks thereafter. Hence there is enormous pressure to get to court as quickly as possible to obtain emergency relief. Yet, in the early hours of a job action for which the union disclaims responsibility, the carrier may be unable to identify which of its employees are engaged in unlawful conduct and which are absent from the workplace for legitimate reasons.

In these circumstances, the carriers *must* sue John and Jane Doe employees at the outset and obtain immediate injunctive relief against them – relief in the form of an order that the carrier can post at the workplace and/or otherwise distribute to its entire workforce.[7] *See, e.g., Delta Air Lines*, 238 F.3d at 1304 n.9 (noting that carrier named one hundred John and Jane Does as defendants). A typical

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[7] It is no answer to suggest that the carrier might avoid its dilemma by naming as defendants every individual member of the involved union. Such a complaint would, by definition, be over-inclusive, covering at least some (unidentified) employees whom all agree are innocent of any wrong-doing.

emergency order will put all employees on notice that, if they are participating in illegal conduct, they must desist or else face contempt of court in addition to potential discipline (including termination) by the carrier. The ability to name John and Jane Doe defendants is the only way of rapidly obtaining a temporary halt to an illegal wildcat action where the union disclaims responsibility for the employees' actions. A quick halt to the work stoppage allows the carrier, the union, and other affected parties time to identify and address the underlying issues that gave rise to the strike.

C. The Eleventh Circuit's Rule Has Nothing to Recommend It.

The Eleventh Circuit's rule – forbidding a carrier to sue fictitious defendants on a temporary basis – will hamstring the carrier's legitimate interest in stopping an illegal work action and frustrate the RLA's policy of averting interruptions to commerce. What might be the justifications for such a costly rule? The decision below offered none, simply citing to *New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir. 1997), and *Wiggins v. Risk Enter. Mgmt. Ltd.*, 14 F. Supp. 2d 1279, 1279 n.1 (M.D. Ala. 1998) (Pet. App. at 3a n.1), decisions that in turn offer no explanation why fictitious defendants may not be named temporarily in federal courts.

A few cases appear to frown on the use of fictitious John Doe defendants in circumstances where it destroys diversity jurisdiction. *Weeks v. Benton*, 649 F. Supp. 1297, 1298-99 (S.D. Ala. 1986) (citing cases from the Ninth Circuit). That is not a concern here, however, because carriers suing to enjoin strikes under the RLA do so using federal question

jurisdiction, not diversity jurisdiction. Another case from a court within the Eleventh Circuit suggested that naming fictitious defendants was improper because "[t]he only purpose [it] could possibly serve is to make it possible to later substitute specifically named and specifically identified defendants * * * after the statute of limitations has run," which Federal Rule of Civil Procedure 15(c) purportedly does not allow. *McAllister v. Henderson*, 698 F. Supp. 865, 869 (N.D. Ala. 1988). But rail and air carriers faced with illegal work stoppages are not concerned with evading the statute of limitations: they have an entirely different – and legitimate and pressing – reason for naming fictitious defendants when they seek a temporary restraining order.

Finally, it is worth noting that the John and Jane Does named as defendants by a carrier faced with a strike or work stoppage are not fictitious in the sense that they are figments of the carrier's imagination. They represent real people whose identities at the moment are unknown to the carrier and they must be named as defendants so that, when the union declines responsibility, the carrier can nevertheless get immediate injunctive relief. The real names are substituted at a later date, after the carrier is able to take discovery. The use of "fictitious" defendants in these circumstances is perfectly appropriate, as the many authorities cited by Petitioner recognize. Pet. at 12-14.

In short, at least in the context of a strike or work stoppage against a rail or air carrier, the Eleventh Circuit's rule against naming fictitious defendants has no basis in logic or public policy. To the contrary, it gravely impedes the carriers' ability to

put an immediate end to potentially crippling interruptions to commerce, while failing to serve any recognized interests of the unions, its members, the courts, or the public interest. This Court should therefore grant review and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 4, 2008